

N. 2869 No. 12886

United States
Court of Appeals
for the Ninth Circuit.

See Vol. 2870-71-72

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES, Appellant,

vs.

J. B. LONDONO, DULIEN STEEL PRODUCTS,
INC., OF CALIFORNIA and DULIEN
STEEL PRODUCTS, INC., Appellees.

And

DULIEN STEEL PRODUCTS OF CALIFOR-
NIA and DULIEN STEEL PRODUCTS,
INC., Appellants,

vs.

J. B. LONDONO and CITIZENS NATIONAL
TRUST & SAVINGS BANK OF LOS
ANGELES, Appellees.

Transcript of Record
In Eight Volumes

Volume I
(Pages 1 to 500)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

NOV 29 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For J. B. Londono:

THOMAS S. BUNN,
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453 S. Spring St.,
Los Angeles 13, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. 7358-PH

J. B. LONDONO,

Plaintiff,

vs.

DULIEN STEEL PRODUCTS, INC., OF CALIFORNIA, a Corporation; DULIEN STEEL PRODUCTS, INC., a Corporation; CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a National Banking Association; MATSON NAVIGATION COMPANY, a Corporation; ONE DOE, TWO DOE, THREE DOE, ONE DOE COMPANY, a Corporation; TWO DOE COMPANY, a Corporation; FOUR DOE and FIVE DOE, Copartners Doing Business Under the Firm Name and Style of SIX DOE COMPANY,

Defendants.

COMPLAINT

Damages for Breach of Warranty, Negligence, and
Issuance of False Bill of Lading

Comes Now the plaintiff and for cause of action
against the defendants complains and alleges:

First Cause of Action
(Dulien)

I.

That plaintiff is a citizen of and resides in the

Republic of Colombia, South America, and has no place of business in the United States of America; and the defendants are citizens [2*] of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

(a) That at all times herein mentioned defendant Dulien Steel Products, Inc., of California, was and now is a corporation organized and existing under the laws of the State of California. That plaintiff is informed and believes and upon that ground alleges that at all times herein mentioned the names of defendants Dulien Steel Products, Inc., of California, Dulien Steel Products, Inc., One Doe Company and Two Doe Company were used interchangeably by said defendants and each of them; and the said defendants are collectively hereinafter referred to as "Dulien" or "defendant Dulien."

(b) That at all times herein mentioned the defendant Citizens National Trust and Savings Bank of Los Angeles, sometimes hereinafter referred to as the "bank" or "defendant bank," was and now is a national banking association, organized and existing under the laws of the United States of America and located and having its principal place of business within the jurisdiction of this Court, to wit: in the City of Los Angeles, County of Los Angeles, State of California; and during all the times herein mentioned the said defendant was and

*Page numbering appearing at foot of page of original Certified Transcript of Record.

now is engaged in a general banking business, in Los Angeles, California.

(c) That at all times herein mentioned the defendant Matson Navigation Company, hereinafter referred to as "Matson," was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco, California, but maintaining also a business office in the City of Los Angeles, California.

(d) That at all times herein mentioned each of [3] the defendants One Doe Company and Two Doe Company was and now is a corporation organized and existing under and by virtue of the laws of the United States, or of one of the States thereof, and doing business in California.

III.

That the defendants One Doe, Two Doe, Three Doe, One Doe Company, a corporation; Two Doe Company, a corporation; and Four Doe and Five Doe, Co-partners doing business under the firm name and style of Six Doe Company, are sued herein under fictitious names, their true names being unknown to plaintiff, and plaintiff will upon the ascertainment of their true names ask leave of Court to make the proper substitutions thereof herein. That at all times herein mentioned each of the said fictitiously named defendants had or claimed and now has or claims some interest in the business conducted under the names of Dulien

Steel Products, Inc., of California, and Dulien Steel Products, Inc., and was and is responsible for and has confirmed the herein alleged conduct of said named defendants Dulien.

IV.

That on or about the 11th day of July, 1946, at Los Angeles, California, the defendant Dulien orally offered to sell to plaintiff at the price of One Hundred Seven (\$107.00) Dollars, per ton, f.o.b. Los Angeles, approximately 2700 tons of unused Government surplus barbed wire, hereinafter referred to as "wire," consisting of 1350 tons of galvanized wire and 1350 tons of black wire, which said defendant then orally represented to plaintiff was owned by said defendant and was in transit from Honolulu, Hawaii, on the Matson Navigation Company's steamship White Squall and was due to arrive in the harbor at Los Angeles, California, on or about July 22, 1946, and then and there exhibited to plaintiff a number of sample coils, or rolls, of good black and galvanized wire free from rust and covered with a rust [4] preventing grease, and produced and exhibited to plaintiff certain additional sample cuttings of good black wire, likewise free from rust, and, as inducement to plaintiff to make such purchase, orally agreed and expressly warranted that the wire to be sold to plaintiff had been, was and would be covered with a coat of protective, rust-preventing grease and was and would be in all respects equal in quality to said exhibited coils and sample cuttings.

V.

That plaintiff, after examining said samples and in reliance upon said defendant Dulien's said representations and express warranty, accepted said offer and agreed to purchase from defendant Dulien said wire, and agreed to pay therefor the sum of \$288,900.00 payable upon drafts by defendant Dulien against credits to be established with defendant bank before July 22nd, 1946. That on account of delay of the White Squall in arriving in the Long Beach Harbor, as hereinafter alleged, said date of July 22nd, 1946, was thereafter by defendant Dulien orally extended to include July 27th, 1946.

VI.

That said purchase and sale were evidenced by a written sale order on a form supplied and prepared by Dulien the following day, that is, July 12, 1946, dated July 12, 1946, bearing No. LA-712, duly signed by defendant Dulien in the name of Dulien Steel Products, Inc., and approved and accepted in writing by plaintiff, a copy of which sale order is attached hereto, marked Exhibit "A" and hereby made a part hereof. That thereafter, on July 26, 1946, defendant Dulien orally represented to plaintiff that the shipment of wire would be only 2300 tons of which defendant Dulien would retain for itself 300 tons, to which change in quantity plaintiff orally agreed, and thereupon and in that manner by said mutual agreement between plaintiff and defendant Dulien the quantity of plaintiff's said purchase was reduced to [5] 2000 tons.

VII.

That said steamship was delayed and docked on July 26, 1946, at Pier A at the Long Beach, California, harbor instead of the Los Angeles harbor; and on July 27, 1946, before plaintiff had seen any of the wire, and within the time which had been by defendant Dulien orally extended to include that day, plaintiff purchased from defendant bank upon a written application therefor and received from said bank and delivered to defendant Dulien said bank's irrevocable letter of credit, by its terms good until July 31, 1946, in favor of defendant Dulien for \$214,000.00 to cover the purchase price of 2,000 tons of wire at \$107.00 per ton, a true copy of which letter of credit is attached hereto marked Exhibit "C" and hereby made a part hereof. That a copy of plaintiff's application for said letter of credit is attached hereto marked Exhibit "B" and hereby made a part hereof.

That by the terms of said letter of credit and the written application therefor defendant bank was instructed by plaintiff, and it bound itself, to pay to defendant Dulien \$214,000.00 on Dulien's sight drafts accompanied by a full set of clean on board ocean bills of lading made out to order, endorsed in blank and marked freight prepaid, and by commercial invoices evidencing shipment of 2,000 tons of barbed wire in one shipment, invoiced on basis of c.i.f. Los Angeles harbor to be shipped from Honolulu, Hawaii, to Los Angeles harbor. That on the same date of July 27th, 1946, and simultaneously therewith plaintiff orally in-

structed the bank that upon the bank's receipt of said required bills of lading it should give authority to plaintiff's Los Angeles shipping agent, Mattoon & Co., Inc., to ship said wire to South America, subject to directions to be thereafter given by plaintiff. [6]

VIII.

That on July 29, 1946, before plaintiff had seen any of said wire defendant bank paid to defendant Dulien upon Dulien's drafts against said letter of credit the sum of \$214,000.00, which sum was the full agreed purchase price of 2,000 tons of wire, and took up said letter of credit.

IX.

That commencing on July 29, 1946, and continuing for several days thereafter until completion of the unloading, there were unloaded from said ship onto the dock at Pier A, Long Beach, California, by defendants Dulien and Matson and placed on dock space chalk-marked for defendant Dulien only 2219 tons of wire instead of 2300 tons; and before plaintiff learned that said shipment was 81 tons short of 2300 tons, defendant Dulien removed from the dock for its own use or other disposition 300 tons and that therefore the delivery of wire to plaintiff was 81 tons short of the 2000-ton quantity for which defendant bank, under plaintiff's letter of credit, had made payment to Dulien.

X.

That none of said wire was of the quality or

in the condition warranted by defendant Dulien or according to the samples exhibited by Dulien to plaintiff, as above alleged in paragraph IV hereof, but the entire shipment was badly rusted and unmerchantable and inferior in all respects to said samples and was of a then undetermined value. That plaintiff is informed and believes and upon that ground alleges that defendant Dulien had purchased said wire from the United States Government in Honolulu for about \$28.00 per ton because it was badly rusted and that said Dulien well knew its rusty condition at the time it made the above-alleged warranty to plaintiff. That in an effort to determine the reasonable market value of said rusty wire at Los Angeles and for the purpose of minimizing the loss thereon, plaintiff, [7] with the written consent of defendant bank and defendant Dulien and after prior written notice to defendant Matson, sold to Gonzales & Blanco, of Los Angeles, California, 25 tons of said wire at the price of \$65.00 per ton for the purpose of experimental cleaning, called "pickling," by the purchaser; that said experiment was made by the purchaser and the result thereof was the ascertainment, and plaintiff hereby alleges, that 1760 tons of the wire was in such bad condition that there was no market for it in Los Angeles County for use in the United States and its highest reasonable market value and the best price obtainable for it in Los Angeles County for export was \$51.00 per ton; and that 134 tons of said wire was so rusty that its value in Los Angeles County was only \$4.50 per ton,

and by and with the written consent of the defendants Dulien and the bank 104 tons thereof was thereafter sold for junk at \$4.50 per ton.

XI.

That defendants Dulien and Matson caused said wire to be unloaded onto the dock without segregation as to quality, and in order to determine the reasonable market value thereof in Los Angeles County as \$51.00 per ton, or any other definite sum, and in order to minimize the loss resulting from the condition of said wire as delivered, it was reasonably necessary that there be expended or incurred, and the plaintiff for that purpose, prior to October 22nd, 1946, did expend or authorize the expenditure of the following sums of money, or incurred the following obligations, in the necessary selection, segregation and moving of said wire on the dock, and in wharf and dock charges thereon while said wire remained upon the dock at Pier A in Long Beach, to wit:

Dock Storage.....	\$2,837.45
Inspection by Los Angeles Cargo	
Appraisers	39.85
Segregation and supervision.....	48.00
Extra drayage on account of poor	
condition of wire.....	130.50
Sorting labor on account of poor	
condition of wire.....	2,734.86
Extra charges by Mattoon & Co., Inc.....	750.00
	<hr/>
	\$6,540.66

That each and all of said special expenses constituted additional loss and damage as a direct and proximate result of defendant Dulien's said misrepresentations and its said breach of warranty as to the quality and quantity of the wire so sold to plaintiff.

XII.

That the reasonable market value in Los Angeles County, California, on July 29, 1946, and for four months thereafter of barbed wire of the character and quality of the samples exhibited to plaintiff by Dulien and so warranted by Dulien to plaintiff was \$160.00 per ton for galvanized wire and \$120.00 per ton for black wire, or an average of \$140.00 per ton of a 2000-ton supply consisting of one-half, or 1000 tons, of black wire and one-half, or 1000 tons, of galvanized wire.

XIII.

That at no time between July 29, 1946, and October 22, 1946, was there available to plaintiff in the State of California, good barbed wire of the type and quality which defendant Dulien agreed to sell to plaintiff which plaintiff could have obtained from any other source as a substitute for that which Dulien had failed to deliver according to its warranty, and at all such times defendant Dulien well knew that fact.

XIV.

That on July 12, 1946, at the time plaintiff placed his said order with Dulien and Dulien accepted said order, plaintiff told Dulien and Dulien knew

that plaintiff's purpose [9] in purchasing said wire was to ship it to South America for resale; and Dulien also at all times between July 11th and October 22nd, 1946, knew the condition of the market for barbed wire at Los Angeles, knew the demand for barbed wire at Los Angeles and knew the value and the market price for export of barbed wire at Los Angeles.

XV.

That as the direct and proximate result of defendant Dulien's said breach of warranty and its said misrepresentations as to said wire it became and was necessary that plaintiff remain in California until proper disposition could be made of said wire for the purpose of minimizing the loss, and plaintiff did remain in California away from his own country and business for three months, and his living expense cost of such stay was \$3,000.00; and plaintiff alleges that within that time he expended that sum in living expenses and that the expenditure thereof was made necessary in the minimizing of the loss on said wire.

XVI.

That as the direct and proximate result of Dulien's failure to deliver the quantity of said wire purchased by plaintiff and its breach of warranty as to the wire actually delivered to or made available to plaintiff, all as above alleged, plaintiff has been damaged in the following sums of money, to wit:

- (a) The full purchase price of \$107.00 per ton for 81 tons of wire which were never delivered to plaintiff, amounting to.....\$ 8,667.00 together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid; [20]
- (b) The difference between the purchase price of \$107.00 per ton and the sale price of \$65.00 per ton, or \$42.00 per ton, for 25 tons of wire sold to Gonzales & Blanco for experimental "pickling" as alleged in paragraph X hereof, amounting to 1,050.00 together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;
- (c) The difference between the purchase price of \$107.00 per ton and the \$51.00 per ton reasonable market value at Los Angeles, California, of 1760 tons of wire, or \$56.00 per ton, amounting to..... 98,560.00 together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;
- (d) The difference between the purchase price of \$107.00 per ton and the \$4.50 per ton actual value at Los Angeles, California, of 134 tons

of wire, or \$102.50 per ton, amount-
 ing to..... 13,735.00
 together with interest thereon at
 the rate of 7% per annum from
 July 29, 1946, until paid;

(e) The amount of special expenses
 alleged in paragraph XI hereof
 amounting to..... 6,540.66
 together with interest thereon [21]
 at the rate of 7% per annum from
 October 22, 1946, until paid;

(f) The amount of plaintiff's special
 personal expenses alleged in para-
 graph XV hereof, amounting to.... 3,000.00
 together with interest thereon at
 the rate of 7% per annum from
 October 22, 1946, until paid;

(g) The plaintiff's loss of profits of
 \$33.00 per ton on the wire pur-
 chased from Dulien, being the dif-
 ference between the purchase price
 of \$107.00 per ton and the \$140.00
 per ton average reasonable market
 value at Los Angeles, Calif., of
 good wire such as was warranted
 by Dulien, on 2000 tons, amounting
 to 66,000.00

Totaling, exclusive of
 interest\$197,552.66

Wherefore, plaintiff demands judgment as herein-after prayed.

Second Cause of Action
(Bank)

I.

Plaintiff incorporates in this, his second cause of action, against the defendant Citizens National Trust and Savings Bank of Los Angeles, paragraphs I to VII, both inclusive, of his foregoing first cause of action, against defendant Dulien, and makes each of said paragraphs by this reference a part hereof [22] as though fully set forth herein at this point.

II.

That on July 29, 1946, before plaintiff had seen any of said wire and before any of said wire had been unloaded from the ship, defendant bank in disregard and violation of the terms of said letter of credit and the instructions given it by plaintiff in plaintiff's application therefor, and particularly without receiving from defendant Dulien any bill of lading whatsoever, negligently paid over and delivered to defendant Dulien the full agreed purchase price of 2,000 tons of wire, to wit: the sum of \$214,000.00.

III.

That there was thereafter unloaded on the dock at Pier A in Long Beach Harbor for plaintiff from said steamship White Squall only 1919 tons of wire, or 81 tons less than the 2000 tons paid for by defendant bank on plaintiff's behalf as above alleged.

That none of said wire for which the defendant bank made said payment of \$214,000.00 was of the quality or in the condition warranted by defendant Dulien, or according to the samples exhibited by Dulien to Plaintiff as above alleged, but the entire lot was badly rusted and unmerchantable and inferior in all respect to said samples and was of a then undetermined value; and said shipment was 81 tons short of the agreed quantity. That in an effort to determine what could be done with said wire and to minimize the loss thereon, plaintiff then, with the full knowledge and written consent of defendant bank and defendant Dulien, sold 25 tons of said wire at the price of \$65.00 per ton for the purpose of experimental cleaning, called "pickling," by the purchaser. That said experiment was made and the result thereof was the ascertainment, and plaintiff hereby alleges, that 1760 [23] tons of the wire was in such rusty condition that there was no market for it in Los Angeles County for use in the United States and its highest market value and the best price obtainable for it in Los Angeles County for export was \$51.00 per ton; that 134 tons of said wire was in such rusty condition that its reasonable market value in Los Angeles County was only \$4.50 per ton, and by and with the written consent of the defendants Dulien and the bank 104 tons thereof was sold for junk at \$4.50 per ton.

IV.

That defendants Dulien and Matson caused said wire to be unloaded onto the dock without segre-

gation as to quality, and in order to determine the reasonable market value thereof in Los Angeles County as \$51.00 per ton, or any other definite sum, and in order to minimize the loss resulting from the condition of said wire as delivered, it was reasonably necessary that there be expended or incurred, and the plaintiff for that purpose, prior to October 22nd, 1946, did expend or authorize the expenditure of the following sums of money, or incurred the following obligations, in the necessary selection, segregation and moving of said wire on the dock, and in wharf and dock charges thereon while said wire remained upon the dock at Pier A in Long Beach, to wit:

Dock Storage.....	\$2,837.45
Inspection by Los Angeles	
Cargo Appraisers.....	39.85
Segregation and supervision.....	48.00
Extra drayage on account of poor	
condition of wire.....	130.50
Sorting labor on account of poor	
condition of wire.....	2,734.86
Extra charges by Mattoon & Co., Inc.....	750.00
	<hr/>
	\$6,540.66

That each and all of said special expenses constituted additional loss and damage as a direct and proximate result of defendant bank's negligence in failure to follow plaintiff's instructions and the terms of said letter of credit, as alleged in the

preceding paragraph II of this plaintiff's second cause of action.

V.

That the reasonable market value in Los Angeles County, California, on July 29, 1946, and for four months thereafter of barbed wire free from rust but otherwise of the type and quality of the wire for which defendant bank so paid defendant Dulien and which pursuant to said payment was delivered to plaintiff was \$160.00 per ton for galvanized wire and \$120.00 per ton for black wire, or an average of \$140.00 per ton of a 2,000 ton supply consisting of one-half, or 1000 tons, of black wire and one-half, or 1000 tons, of galvanized wire.

VI.

That at no time between July 29, 1946, and October 22, 1946, was there available to plaintiff in the State of California, good barbed wire free from rust but otherwise of the type and quality of that which was delivered to plaintiff pursuant to the bank's above-alleged payment to Dulien, which plaintiff could have obtained from any other source as a substitute for the rusty wire so delivered.

VII.

That on July 27, 1946, when plaintiff purchased from defendant bank the above-alleged letter of credit plaintiff told said bank and said bank knew that plaintiff's purpose in purchasing the wire for payment for which said letter of credit was to be used was to ship said wire to South America for

resale; and plaintiff is informed and believes and upon that ground alleges that defendant bank at that time knew the market value [25] in Los Angeles County of good wire of the type and quality ordered by plaintiff and for which a clean bill of lading could have been properly issued.

VIII.

That as the direct and proximate result of defendant bank's violation of plaintiff's instructions and the terms of said letter of credit and the consequent delivery to plaintiff of rusty wire instead of wire free from rust, as above alleged it became and was necessary that plaintiff remain in California until proper disposition could be made of said rusty wire for the purpose of minimizing the loss, and for that purpose plaintiff did remain in California away from his own country and business for three months, and that the cost to him of such stay was \$3,000.00; and plaintiff alleges that within that time he expended that sum in living expenses and that the expenditure thereof was made necessary in the minimizing of the loss on said wire.

IX.

That after the full agreed purchase price of said wire had been paid by defendant bank to defendant Dulien as above alleged, and after said wire had been unloaded from the ship, plaintiff first learned that no bill of lading had been obtained by the bank, and all plaintiff's subsequent conduct herein alleged in relation to said wire has been and was

with the bank's full knowledge and consent and under an agreement that it should be without prejudice to any prior existing rights of either of them against the other.

X.

That as the direct and proximate result of defendant bank's payment of said \$214,000.00 purchase price of [26] said wire without demanding and receiving from defendant Dulien, the seller, the clean on board order bills of lading required by plaintiff in plaintiff's instructions to defendant bank, as above alleged, and by reason of said bank's said payment of said sum for wire other than and different from that specified in and to which plaintiff would have been entitled under said letter of credit, plaintiff has been damaged in the following sums of money on the following accounts, to wit:

- (a) The full purchase price of \$107 per ton for 81 tons of wire which were never delivered to plaintiff, amounting to.....\$ 8,667.00 together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;
- (b) The difference between the purchase price of \$107.00 per ton and the sale price of \$65.00 per ton, or \$42.00 per ton, for 25 tons of wire sold to Gonzales & Blanco for experimental "pickling" as alleged in

	paragraph III hereof, amounting to	1,050.00
	together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;	
(c)	The difference between the purchase price of \$107.00 per ton and the \$51.00 per ton reasonable market value at Los Angeles, California, of 1760 tons of wire, or \$56.00 per ton, amounting to.....	98,560.00
	together with interest thereon [27] at the rate of 7% per annum from July 29, 1946, until paid;	
(d)	The difference between the purchase price of \$107.00 per ton and the \$4.50 per ton actual value at Los Angeles, California, of 134 tons of wire, or \$102.50 per ton, amounting to.....	13,735.00
	together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;	
(e)	The amount of special expenses alleged in paragraph IV hereof amounting to.....	6,540.66
	together with interest thereon at the rate of 7% per annum from October 22, 1946, until paid;	
(f)	The amount of plaintiff's special personal expenses alleged in paragraph VIII hereof amounting to..	3,000.00

together with interest thereon at the rate of 7% per annum from October 22, 1946, until paid;

- (g) The plaintiff's loss of profits of \$33.00 per ton on the wire purchased from Dulien, being the difference between the purchase price of \$107.00 per ton and the \$140.00 per ton average reasonable market value at Los Angeles, California, of good wire such as was warranted by Dulien, on 2000 [28] tons, amounting to..... 66,000.00

Totaling, exclusive of interest..\$197,552.66

XI.

That a part of the purchase price of said \$214,000.00 letter of credit was represented by a loan of \$54,000.00 made to plaintiff by defendant bank through its Loan Department which, it was orally agreed between said bank and plaintiff on the date said letter of credit was purchased, to wit: July 27, 1946, should be represented by plaintiff's promissory note to be thereafter executed; and plaintiff also agreed to pay the bank its usual charge of \$535.00 for such letter of credit and for the bank's services in making payment thereunder and on July 31, 1946, upon the bank's representations to plaintiff, which it then made, that it had received the required bills of lading and had paid Dulien's drafts for \$214,000.00 against said letter of credit, plaintiff believing said representations and having

no knowledge of any failure on the part of the bank to comply with plaintiff's instructions and the terms of said letter of credit regarding the required bills of lading, signed and delivered to the bank his promissory note dated July 31, 1946, prepared by the bank and payable to the bank, for \$54,535.00, covering the principal amount of said loan of \$54,000.00 and the bank's said charge of \$535.00 for the said letter of credit and the bank's said agreed services.

XII.

That defendant bank now holds plaintiff's said promissory note of July 31, 1946, originally for \$54,535.00, upon which plaintiff is entitled to credits for cash payments of \$40,814.45 made thereon and a refund of the bank's charge of \$535.00 included therein, totalling \$41,349.45; and, after [29] due allowance therefor, defendant bank is entitled upon plaintiff's demand herein to a credit of \$13,185.55 representing the unpaid balance on said note.

Wherefore, plaintiff demands judgment as hereinafter prayed.

Third Cause of Action (Matson)

I.

Plaintiff incorporates in this, his third cause of action, against defendant Matson Navigation Company, paragraphs I to VII, both inclusive, of his foregoing first cause of action, against defendant Dulien, and paragraphs II and III of his foregoing

second cause of action, against the defendant bank, and makes each of said paragraphs by this reference a part hereof as though fully set forth herein at this point.

II.

That defendant Matson was the owner, or the operating agent of the owner, of the White Squall, the ship upon which said wire was shipped from Honolulu, Hawaii, to Los Angeles, and the shipment of said wire was made under a bill of lading issued by defendant Matson to defendant Dulien. That plaintiff does not have and never has had said bill of lading or any copy thereof, but plaintiff is informed and believes and upon that ground alleges: that said bill of lading was for approximately 2300 tons of wire, or the equivalent thereof in pounds, whereas the quantity of wire actually shipped thereunder was only 2219 tons or 81 tons short of the quantity shown in said bill of lading; that said bill of lading was what is in the shipping business known as a straight clean bill of lading, that is, it was a straight bill of lading which upon its face showed that defendant Dulien was both the shipper and the consignee [30] of the wire and that said wire had been received by Matson from the shipper (Dulien) in apparent good order except as therein otherwise noted and that there were no exceptions noted in said bill of lading.

III.

That plaintiff is informed and believes and upon that ground alleges that at the time said bill of

lading was issued by Matson said wire was obviously badly rusted and was not in such condition as to warrant the issuance of a clean bill of lading thereon but, on the contrary, was in such obviously bad condition on account of said rust as to require, under the provisions of Section 22 of Chapter 415 of the Act of August 29, 1916, (U.S.C.A. Tit. 46, Section 102), the notation on the bill of lading of exceptions to the "apparent good order" representation therein contained; that said bill of lading consisted of a printed form into which there had been typed certain information applicable to this particular shipment, showing, among other things, the name of the shipper, the name of the ship, the name of the consignee and the quantity of wire supposed to have been delivered to the carrier; that thereafter in conformance with said bill of lading a freight bill upon a printed form was issued by defendant Matson containing in typewriting those same insertions copied from said bill of lading and that said freight bill did not contain any exceptions or notations of exception to the "good order and condition" representation made in said bill of lading as to the condition of said wire; that it was then the custom and practice of defendant Matson, with which custom and practice defendant bank was then familiar, to cause each freight bill issued by it to contain all the descriptive information about the shipment covered thereby as was contained in the bill of lading issued upon the same shipment; and that therefore the freight bill so issued by defendant Matson was false in that it did not [31] contain

a notation of the obviously rusty condition of said wire and it was for 81 tons more wire than was actually shipped; that a copy of said freight bill is hereto attached marked Exhibit "D" and hereby made a part hereof; that when defendant Dulien on July 29, 1946, presented to defendant bank Dulien's drafts for \$214,000.00 drawn against plaintiff's said letter of credit, as above alleged, said drafts were accompanied by the above-mentioned freight bill instead of the clean order bill of lading specified in and required by plaintiff's above alleged instructions to defendant bank and by the terms of said letter of credit, and that defendant bank carelessly and negligently mistook said freight bill for the required bill of lading and made said \$214,000.00 payment to Dulien thereon.

IV.

That the negligence of defendant Matson in issuing said false bill of lading and said freight bill following the inserted language of said bill of lading combined with the negligence of defendant bank in paying thereon, and the direct and proximate result of said combined negligence of said defendants Matson and the bank together was loss and damage to the plaintiff in the following sums of money on the following accounts, to wit:

- (a) The full purchase price of \$107.00
per ton for 81 tons of wire which
were never delivered to plaintiff,
amounting to.....\$ 8,667.00
together with interest thereon at the

rate of 7% per annum from July 29, 1946, until paid;

- (b) The difference between the purchase price of \$107.00 per ton and the sale price of \$65.00 per ton, or [32] \$42.00 per ton, for 25 tons of wire sold to Gonzales & Blanco for experimental "pickling" as hereinbefore alleged, amounting to. 1,050.00
together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;
- (c) The difference between the purchase price of \$107.00 per ton and the \$51.00 per ton reasonable market value at Los Angeles, California, of 1760 tons of wire, or \$56.00 per ton, amounting to..... 98,560.00
together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;
- (d) The difference between the purchase price of \$107.00 per ton and the \$4.50 per ton actual value at Los Angeles, California, of 134 tons of wire, or \$102.50 per ton, amounting to..... 13,735.00
together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;
- (e) The extra expense set out in full in paragraph XI of plaintiff's first

cause of action, amounting to..... 6,540.66
together with interest thereon at
the rate of 7% per annum from Oc-
tober 22, 1946, until paid; [33]

- (f) Plaintiff's personal living expenses
in California for three months
while attempting to minimize the
loss on said wire, as set out in full
in paragraph XV of plaintiff's first
cause of action, amounting to..... 3,000.00
together with interest thereon at
the rate of 7% per annum from
October 22, 1946, until paid; _____

Totaling, exclusive of interest..\$131,552.00

V.

That plaintiff is informed and believes and upon
that ground alleges that the steamship White
Squall, upon which said wire was transported from
Honolulu to Long Beach, California, is now in
Australian waters and is sailing under another
name.

Wherefore, plaintiff prays judgment as follows:

1. Against defendants Dulien Steel Products,
Inc., of California, Dulien Steel Products, Inc., One
Doe, Two Doe, Three Doe, One Doe Company, Two
Doe Company, Four Doe, Five Doe and Six Doe
Company, on plaintiff's first cause of action, in the
sum of \$197,552.66;

2. Against defendant Citizens National Trust
and Savings Bank of Los Angeles, on plaintiff's

second cause of action, in the sum of \$184,367.11 and the cancellation of plaintiff's promissory note dated July 31, 1946;

3. Against defendant Matson Navigation Company, on plaintiff's third cause of action, in the sum of \$131,552.66; [34]

4. Against all defendants for interest at the rate of 7% per annum upon all amounts found to be due from the respective dates of accrual thereof until paid; and

5. For any and all other proper relief.

/s/ THOMAS S. BUNN,

Attorney for Plaintiff. [35]

State of California,

County of Los Angeles—ss.

J. B. Londono, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing and above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ J. B. LONDONO.

Subscribed and sworn to before me this 16th day of July, 1947.

[Seal] /s/ GEORGIA CUMMING,

Notary Public in and for said County and [36]
State.

DULIEN STEEL PRODUCTS, INC.

11601 SOUTH ALAMEDA STREET
LOS ANGELES, CALIF.

July 12, 1946

SALE ORDER NO. LA-712

SOLD TO: J.B. LONDONO,
408 SOUTH SPRING STREET, ROOM #306,
LOS ANGELES, CALIF.

We confirm having sold to you the following goods under the terms and conditions as stated below:

COMMODITY: UNUSED GOVERNMENT SURPLUS BARBED WIRE, AS PURCHASED BY
SELLER FROM INTERIOR DEPARTMENT

QUANTITY: APPROXIMATELY 2,700 NET TONS, AS FOLLOWS:
1,350 NET TONS GALVANIZED - 10% MORE OR LESS
1,350 NET TONS BLACK - 10% MORE OR LESS

SPECIFICATIONS: 12 and 12 $\frac{1}{2}$ GAUGE TWO STRAND WITH FOUR POINT BARBS
SPACED AT 3" and 4" INTERVALS

PRICE: \$ 107.00 PER NET TONS FOB STEAMER LOS ANGELES

SHIPMENT: IMMEDIATE - STEAMER DUE TO ARRIVE LOS ANGELES
ABOUT JULY 22, 1946

TERMS: LETTER OF CREDIT FOR \$160,000.00 NOW ON DEPOSIT AT LOS
ANGELES MAIN OFFICE OF CITIZENS NATIONAL BANK, SUBJECT
TO FULL DRAFT ON DEPOSIT OF ON BOARD BILLS OF LADING.
REMARKS: LETTER OF CREDIT FOR \$128,900.00 TO BE ESTABLISHED ON OR
BEFORE JULY 22, 1946, SUBJECT TO DRAFT ON PRESENTATION
OF DELIVERY RECEIPTS. ANY RAILROAD DEMURRAGE ACCRUING
DUE TO NON-ESTABLISHMENT OF LETTER OF CREDIT BY JULY 22,
1946, WILL BE FOR ACCOUNT OF BUYER.
ACCEPTANCE OF MATERIAL SUBJECT TO REJECTION BY BUYER OF
NOT MORE THAN 300 NET TONS, DUE TO EXCESSIVE WEATHERING.

All contracts and agreements are subject to strikes, riots and other conditions beyond our control.

APPROVED AND ACCEPTED:

DULIEN STEEL PRODUCTS, INC.

BY: *Edwin*

Application for Commercial Letter of Credit

3645

JULY 27, 1946

TO CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES
Foreign Department
Los Angeles 54, California

Please issue {by mail} ~~by mail~~ for our account an IRREVOCABLE* LETTER OF CREDIT as follows:

in favor of DULIN STEEL PRODUCTS INC., 11601 SO. ALAMEDA ST., LOS ANGELES, CALIFORNIA

for account of J. B. LONDON, LOS ANGELES, CALIFORNIA

up to the aggregate amount of US\$214,000.00,

available by drafts at sight drawn at your option on you or your correspondent

for 100 % of the invoice cost.

The drafts must be accompanied by the documents listed below marked with an X:

☒ Full set of clean ocean bills of lading made out to ~~our~~ order. endorsed in blank, freight prepaid.

Delivery order of _____
(Please state name of company to issue same)

Consular invoice.

Insurance certificate covering marine war risk theft pilferage leakage breakage INSURANCE

Insurance is covered by ourselves under Policy No.

of _____
covering all hazards and contingencies.

Certificates of _____
(Please state name of company to issue same)

Other documents _____
(If special documents are required, please state name of company to issue same)

and commercial invoices evidencing shipment of 2000 TONS BARRED VINE

(Please mention commodity only, omitting details as to grade, quality, price, etc.)

in one ~~shipment~~ shipment

invoiced on basis of C.I.F. — ~~Los Angeles Harbor~~ Los Angeles Harbor to be shipped

from Honolulu T.H. to Los Angeles Harbor

Credit to remain in force until JULY 31, 1946

Special instructions _____

1/We hereby agree that the credit shall be subject to your usual terms and conditions, and in consideration of the issuance thereof

1/We agree to sign your form of Letter of Credit Agreement as per copy on the reverse side hereof.

\$0.000. cash deposit

5% Min. \$10.-

Yours very truly,

J. B. London

Address 408 South Spring St. Rm. 306, L.A.

By

(over)

*An Irrevocable Credit can only be amended with the consent of all parties concerned.

C. N. 453-4438

NY-3076

EXHIBIT "B"
(FACE)

Citizens National Trust & Savings Bank
of Los Angeles

AR 5184:

In consideration of your opening, at our request, your Commercial Letter of Credit No. 368 (herein called "The Credit"), the terms of which appear on the reverse hereof, and are hereby approved by us, we hereby agree as follows:

1. As to drafts of acceptance under or purporting to be under the Credit, which are payable in United States currency, we agree: (a) in the case of each sight draft, to reimburse you, at your office, on demand, in lawful money of the United States, the amount paid on such drafts, or, if so demanded by you, to pay to you at your office in advance such money the amount required to pay such drafts; and (b) in the case of such acceptance, to pay to you, at your office, in lawful money of the United States, the amount paid, on demand but in any event not later than one business day prior to maturity, or, in the case of the acceptance is not payable at your office, then on demand but in any event in the reach the place of payment in the course of the mails not later than one business day prior to maturity.

2. As to drafts of acceptance under or purporting to be under the Credit, which are payable in currency other than United States currency, we agree: (a) in the case of such drafts, to reimburse you, at your office, on demand, in lawful money of the United States, the amount paid on such drafts, or, if so demanded by you, to pay to you at your office in advance such money the amount required to pay such drafts; and (b) in the case of such acceptance, to pay to you, at your office, in lawful money of the United States, the amount paid, on demand but in any event not later than one business day prior to maturity in the course of the mails not later than one business day prior to maturity with first class bankers' demand bills of exchange to be approved by you for the amount of acceptance, payable in the currency of the acceptance and bearing our endorsement, or, if you so request, to pay to you, at your office, in payment in the currency in which the acceptance is payable.

3. We also agree to pay you, on demand, a commission at the rate of one and one-half percent (1 1/2 %), on such part of the Credit as may be used, and, in any event, a minimum commission of \$ 10.00, and all charges and expenses paid or incurred by us in connection therewith and interest where chargeable.

4. We hereby recognize and admit our ownership in and unqualified right to the possession and disposal of all property shipped or warehoused under or pursuant to or in connection with the Credit or in any way relative thereto or to the drafts drawn thereunder, whether or not released to us on trust or bailment receipt, and also in and to all shipping documents, warehouse receipts, policies or certificates of insurance and other documents accompanying or relative to drafts drawn under the Credit, and in and to the proceeds of such drafts or credit or any other obligation or liability to us, have been fully paid and discharged, all as security for such obligations and liabilities; and that all or any of such property and documents, and the proceeds of any thereof, coming into the possession of you or any of your correspondents, may be held and disposed of by you as hereinafter provided; and that the same, or any of your correspondents, at any time of other security, of whatsoever nature, including cash, shall not be deemed a waiver of any of your rights or powers herein granted.

5. In the event that you deliver to us any of the goods, wares or merchandise covered by the said Credit prior to your having received reimbursement with respect to the relative drafts of acceptance as herein provided, we agree to sign and deliver to you a Trust Receipt or Trust Receipts as defined in and complying with the provisions of the Uniform Trust Receipts Law of the State of California and a Statement of Trust Receipt Financing in the form specified in the said statute, and we further agree that your rights under the said statute shall be in addition to and not in limitation of your rights under the said statute or any other applicable statute.

6. Except insofar as instructions have been heretofore given by us in writing expressly to the contrary, we agree that you and any of your correspondents may receive and accept the same as documents of insurance either insurance policies or insurance certificates.

7. Except insofar as instructions have been heretofore given by us in writing expressly to the contrary, we agree that part shipments may be made under the Credit and you may honor the relative drafts; and that, if the Credit specifies shipments in installments within stated periods, and the shipper fails to ship in any designated period, shipments of other installments may nevertheless be made in their respective designated periods and you may honor the relative drafts.

8. We agree that in the event of any extension of the maturity or time for presentation of drafts, acceptances or documents, or any other modification of the terms of the Credit, or the request of any of us, with or without notification to the others, or in the event of any increase in the amount of the Credit at our request, this agreement shall be binding upon us with regard to the Credit so increased or otherwise modified, to drafts, documents and property covered thereby, and to any action taken by you or any of your correspondents in accordance with such extension, increase or other modification.

9. The users of the Credit shall be deemed our agents and we assume all risks of their acts or omissions. Neither you nor your correspondents shall be responsible for the nature, character, quality, quantity, condition, packing, value, or delivery of the property purporting to be represented by documents, for any difference in character, quality, condition, or value of the property from that expressed in documents, for the validity, sufficiency, or genuineness of documents, even if such documents should in fact prove untrue, or for any other risk connected with insurance, for any deviation from instructions, delay, default or fraud by the shipper or anyone else in connection with the property or shipment of either the property or any of the documents relating thereto, for delay in giving or failure to give notice of arrival or any other notice, for any breach of contract between the shipper and ourselves or ourselves or any of us, for any law, customs and regulations which may be effective in countries of negotiation and/or payment of the amount of any draft to bear any reference or adequate reference to the Credit, or failure of documents to accompany any draft at negotiation, or failure of any person to meet the amount of any draft on the reserve of the Credit or to surrender or take up the Credit or to send forward documents apart from drafts as required by the terms of the Credit, each of which, by mail, cable, telegraph, wireless or otherwise, whether or not they be in cipher, nor shall you be responsible for any error, neglect or default of any of your correspondents in the course of the above shall affect, impair, or prevent the vesting of any of your rights or powers hereunder. In furtherance and extension and not in limitation of the specific provisions of good faith, shall be binding on us and shall not put you or by any correspondent of yours under or in connection with the Credit or the relative drafts, documents or property, in breach of good faith.

10. We agree to procure promptly any necessary import and export or other licenses for the import or export or shipping of the property and to comply with all foreign and domestic governmental regulations in regard to the shipment of the property or the financing thereof, and to furnish such certificates in that respect as you may at any time require, and to assign the property adequately covered by insurance satisfactory to you, in companies satisfactory to you, and to assign the policies or certificates of insurance to you, or to make such assignment, if any, payable to you, at your option; and to furnish you if demanded with evidence of acceptance by the insured of such assignment.

11. Each of us agree at any time and from time to time, on demand, to deliver, convey, transfer, or assign to you, as security for any and all of his and/or our obligations hereunder, and also for any and all other obligations and liabilities, absolute or contingent, due or to become due, which are now or may at any time hereafter be owing to us or to you, additional security of a value and character satisfactory to you, or to make such payment as you may require. Each of us agrees that all property belonging to us or to you, in which he or we may have an interest, of every name and nature whatsoever, now or at any time hereafter delivered, conveyed, transferred, assigned, or sold to us or to you, for safekeeping or otherwise, including any items received for collection or transmission, and the proceeds thereof whether or not such property is in whole or in part subject to us on trust or bailment receipt are hereby made security for each and all such obligations and liabilities. Each of us agrees that upon his or our failure at all times to keep a margin of such obligations and liabilities shall become and be immediately due and payable without demand or notice, notwithstanding any credit or time allowed to him or us, or any instrument or agreement to the contrary, or against him or us, or upon the making by him or us of any assignments for the benefit of creditors, or upon the filing of any voluntary or involuntary petition in bankruptcy or upon such obligations and liabilities shall become and be immediately due and payable without demand or notice, notwithstanding any credit or time allowed to him or us, or any instrument or agreement to the contrary, or upon his or our failure to pay any of such obligations or liabilities when it or they shall become or be made due, to sell immediately, at public sale or at public auction or at brokers' board or otherwise, at your option, in such parcel or parcels and at such time or times and at such place or places and for such price or prices as you may deem proper, and to apply the net proceeds of such sale or sales, together with any balance of deposits and any sums credit by or due from any bank or other institution, to pay the general account or otherwise, in the payment of any and all of his and/or our obligations or liabilities to you whenever arising. If any such sale be at brokers' board or otherwise, you may yourself be a purchaser at such sale, free from any right of redemption, which we and each of us hereby expressly waive and release.

12. You shall not be deemed to have waived any of your rights hereunder, unless you or your authorized agent shall have signed such waiver in writing. No such waiver, unless made as stated therein, shall be effective as to any transaction which occurs subsequent to the date of such waiver, nor as to any continuance of a breach after such waiver.

13. The word "property" as used in this agreement includes goods, merchandise, securities, funds, choses in action, and any and all other forms of property, whether real, personal or mixed and any right or interest therein.

14. If this agreement is signed by one individual, the terms "my," "you," "us," shall be read throughout as "I," "my," "me," as the case may be. If this agreement is signed by two or more parties, it shall be the joint and several agreements of such parties.

15. We hereby expressly waive the provisions of Section 2845 of the Civil Code of the State of California, and all rights thereunder. Said Section 2845 of the Civil Code applies to guarantors as well as to a surety, and provides that "a surety may require his creditors to proceed against the principal, or to pursue any other remedy in his power which the surety may himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced."

16. The obligations hereof shall continue in force, and apply, notwithstanding any change in the membership of any partnership undertaken, whether arising from the death or retirement of one or more partners or the accession of one or more new partners, and the obligations hereof shall bind the heirs, executors, administrators, successors and assigns of the guarantor, and all rights, benefits and privileges hereby conferred on you shall be and hereby are extended to and conferred upon and may be enforced by your successors and assigns.

17. This guaranty and all rights, obligations and liabilities arising hereunder shall be construed according to the laws of the State of California.

18. With further reference to paragraphs 1, 2, and 3 of this agreement, we hereby authorize you to charge our account in reimbursement.

J. B. LONDON

EXHIBIT "B"

(BACK)

Citizens National Bank

Trust & Savings

of Los Angeles

457 SOUTH SPRING STREET

CABLE ADDRESS "CITBANK"

DULIN STEEL PRODUCTS INC.

11601 SO. ALAMBA STREET

LOS ANGELES, CALIFORNIA

IRREVOCABLE CREDIT NO 3645

DATE:

LOS ANGELES CALIFORNIA JULY 27, 1946

WE HEREBY AUTHORIZE YOU TO VALUE ON US

FOR ACCOUNT OF J. B. LONDON, LOS ANGELES, CALIFORNIA

UP TO THE AGGREGATE AMOUNT OF TWO HUNDRED FORTY-THREE THOUSAND (\$214,000.00) U.S. DOLLARS

AVAILABLE BY YOUR DRAFTS AT EIGHT FOR INVOICE COST

TO BE ACCOMPANIED BY THE FOLLOWING DOCUMENTS

FULL SET CLEAN ON BOARD OCEAN BILLS OF LADING MADE OUT TO ORDER, BLANK ENDORSED, MARKED
FREIGHT PREPAID -
COMMERCIAL INVOICES -

REPRESENTING SHIPMENT OF: TWO THOUSAND (2,000) TONS ROCKET WIRE
..... C.I.F. LOS ANGELES HARBOR
..... IN ONE SHIPMENT

FROM: HONOLULU T.H. TO: LOS ANGELES HARBOR

A COPY OF THE CONSULAR INVOICE, COMMERCIAL INVOICE AND ONE BILL OF LADING MUST BE
FORWARDED BY THE NEGOTIATING BANK BY FIRST MAIL (IF POSSIBLE ON STEAMER CARRYING MERCHANDISE)
DIRECT TO THE CITIZENS NATIONAL TRUST & SAVINGS BANK, LOS ANGELES, CALIFORNIA, ATTACHING TO
THE DRAFT A STATEMENT TO THAT EFFECT. ALL REMAINING DOCUMENTS MUST ACCOMPANY THE DRAFT.

ALL DRAFTS DRAWN UNDER THIS CREDIT MUST BEAR THE FOLLOWING CLAUSE: DRAWN UNDER
CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES L.C. NO. 3645 AND ALL AMOUNTS SO
DRAWN MUST BE ENDORSED ON THE BACK HEREOF.

WE HEREBY AGREE WITH THE DRAWERS, ENDORSERS AND BONA FIDE HOLDERS OF DRAFTS DRAWN
UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT, THAT SUCH DRAFTS WILL BE DULY
HONORED ON DUE PRESENTATION TO THE DRAVEE IF NEGOTIATED ON OR BEFORE JULY 31, 1946.

YOURS VERY TRULY

Mr. H. Schroeder, Vice President & Mgr.

W. Glenn Powers, Pro-Manager

AGREEMENT ON REVERSE SIDE TO
BE EXECUTED AND RETURNED TO
CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES

EXHIBIT "C"

FORM NO. F-107
(REV. 6-28-57-342)

MATSON NAVIGATION COMPANY

ORIGINAL FREIGHT BILL

DATE 7/27/46	PORT OR PLACE OF LOADING HONOLULU TH	PORT OR PLACE OF DISCHARGE LONG BEACH	NAME OF VESSEL SS WHITE SQUALL	VOY. NO. 96/513	B/L NO. LA 29
SHIPPER DULIEN STEEL PRODS OF CALIF C/O LACY HOFIUS			CONSIGNEE DULIEN STEEL PRODUCTS OF CALIF 11611 SOUTH ALAMEDA ST LOS ANGELES CALIF		
FOR TRANS-SHIPMENT TO WILMINGTON CAL			VIA		

MARKS (AS GIVEN BY SHIPPER)	PACKAGES	KIND OF PACKAGE	DESCRIPTION OF GOODS AND CONTENTS OF PACKAGES (AS GIVEN BY SHIPPER)	SHIPPER'S MEASUREMENT AND WEIGHT	
				CUBIC FEET	WEIGHT
NONE <div style="border: 1px solid black; padding: 5px; width: fit-content;"> PAYMENT RECEIVED CASH CHECK 252996.21 H.D. NOT BILLED </div> VA 2421 11-9151	55428	ROLLS BARBED WIRE			4,599.948
TOTAL PACKAGES					

CUBIC FEET	WEIGHT	RATE	FREIGHT	TRUCK TAX	TOLL OR WHARFAGE	TERRITORIAL TOLL	ADVANCE CHARGES	P. M. T. CHARGE	TOTAL FREIGHT
	4,599.948	10.30	23689.73		574.99	919.90			25184.62

ORIGINAL FREIGHT BILL									TOTAL PREPAID TOTAL COLLECT 25184.62
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COMPANY WILL NOT BE RESPONSIBLE FOR FREIGHT REMAINING ON THE DOCK LONGER THAN 24 HOURS AFTER ARRIVAL OF STEAMER.
DAMAGE WILL BE ASSESSED ON ALL UNDELIVERED SHIPMENTS IN ACCORDANCE WITH RULES AND REGULATIONS OF BOARD OF HARBOR COMMISSIONERS.

This Bill of Lading endorsed in full to J.B.Londone for
not more than 4,000,000 pounds. Balance of shipment to
be picked up by us.

Dulien Steel Products Inc of Calif.

L. L. London

EXHIBIT "D"
(back)

[Endorsed]: Filed July 17, 1947.

District Court of the United States for the Southern
District of California, Central Division

Civil Action File No. 7358-PH

SUMMONS IN CIVIL ACTION

To the Above-Named Defendant:

You are hereby summoned and required to serve upon Thomas S. Bunn, plaintiff's attorney, whose address is 725 Citizens National Bank Bldg., 453 South Spring St., Los Angeles 13, Calif., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] EDMUND L. SMITH,
Clerk of Court.

By /s/ EDWARD F. DREW,
Deputy Clerk.

Date: July 17, 1947.

Note—This summons is issued pursuant to Rule 4
of the Federal Rules of Civil Procedure. [43]

Return of Service of Writ

United States of America,
Southern District of California—ss.

I hereby certify and return that I served the
annexed Summons and Complaint on the therein-

named Dulien Steel Products, Inc., by handing to and leaving a true and correct copy thereof with Louis Dulien, President of Dulien Steel Products, Inc., personally at Los Angeles in said District on the 4th day of August, 1947.

ROBERT E. CLARK,
U. S. Marshal.

By /s/ C. W. ROSS,
Deputy.

[Endorsed]: Filed August 25, 1947. [45]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANT CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES (1) TO DISMISS THE ACTION, AND (2) FOR A MORE DEFINITE STATEMENT OR FOR A BILL OF PARTICULARS

Plaintiff having filed a complaint consisting of three separately stated causes of action, of which the first is directed solely to the defendants Dulien Steel Products, Inc., of California, and Dulien Steel Products (hereinafter referred to as Dulien); the second solely to the defendant Citizens National Trust & Savings Bank of Los Angeles, and the third solely to defendant Matson Navigation Company (hereinafter referred to as Matson), defendant Citizens National Trust & Savings Bank of Los

Angeles (hereinafter referred to as the Bank) moves the court as follows:

Motion to Dismiss for a Failure to State a Claim

I. For an order dismissing the action upon the ground that the complaint fails to state a claim against defendant Bank upon which relief can be granted. [46]

* * *

COSGROVE, CLAYTON,
CRAMER & DIETHER,

JOHN N. CRAMER,

L. A. DIETHER,

By /s/ JOHN N. CRAMER,
Attorneys for Defendant Citizens National Trust
& Savings Bank of Los Angeles.

[Endorsed]: Filed August 15, 1947. [49]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant Dulien Steel Products, Inc., of California, a corporation, and Dulien Steel Products, Inc., a corporation, and severing from its co-defendant answers the complaint on file herein as follows:

I.

The defendant having no information or belief upon the subject mentioned in paragraph one in first cause of action of plaintiff's complaint sufficient to enable him to answer any of [52] the allegations therein contained, and placing his denial on that ground, denies each and every allegation set forth therein.

II.

Admits the allegation contained in subparagraph (a) of paragraph two. Denies each and every allegation contained in subparagraphs (b), (c), and (d) on the grounds that this defendant has no information or belief upon the subject mentioned with which to enable him to form a belief as to the truth of any of said allegations, and therefore denies said allegations on those grounds.

III.

Answering paragraph three of the complaint herein, defendant Dulien Steel Products, Inc., of California admits that it is responsible for the sale of the products referred to in the complaint.

IV.

Defendant Dulien Steel Products, Inc., of California denies specifically each and every allegation contained in paragraph four of the complaint with the exception that it admits having entered into a contract to sell to the plaintiff certain barbed wire as more particularly described in defendant's sale order #LA-712, dated July 12, and set forth in more detail in Exhibit A attached to plaintiff's complaint.

V.

Defendant Dulien Steel Products, Inc., denies each and every allegation contained in paragraph five of the complaint except that the plaintiff agreed to pay defendant for said wire the sum of \$288,900.00.

VI.

Defendant Dulien Steel Products, Inc., admits the allegations contained in paragraph six of the complaint.

VII.

Defendant Dulien Steel Products, Inc., admits the [53] allegations contained in lines 3 to 17, inclusive, of paragraph seven of the complaint; however, due to lack of knowledge and sufficient information with which to form a belief as to the truth of the allegations contained in paragraph seven from line 18 to line 32, and placing his denial on that ground, defendant denies said allegations.

VIII.

Defendant Dulien Steel Products, Inc., denies

that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in paragraph eight of plaintiff's complaint, and placing his denial on that ground denies each and every allegation contained therein.

IX.

Defendant Dulien Steel Products, Inc., denies each and every allegation contained in paragraph nine of the complaint.

X.

Defendant Dulien Steel Products, Inc., denies each and every allegation contained in paragraph ten of the complaint.

XI.

Defendant Dulien Steel Products, Inc., denies each and every allegation contained in paragraph eleven of the complaint.

XII.

Defendant Dulien Steel Products, Inc., denies each and every allegation contained in paragraph twelve of the complaint.

XIII.

Defendant Dulien Steel Products, Inc., denies each and every allegation contained in paragraph thirteen of the complaint.

XIV.

Defendant Dulien Steel Products, Inc., denies each and every allegation contained in paragraph fourteen of the complaint.

XV.

Defendant Dulien Steel Products, Inc., [54] denies each and every allegation contained in paragraph fifteen of the complaint.

XVI.

Defendant Dulien Steel Products, Inc., denies each and every allegation contained in paragraph sixteen of the complaint, and particularly denies that the plaintiff has been damaged in the sum of \$197,552.66 or in any amount or at all.

Second and Third Causes of Action

For the purpose of pleading to the second and third causes of action which are not alleged in the complaint against this defendant, a general denial is hereby made to each and every allegation contained in said second and third causes of action.

Wherefore, defendant, Dulien Steel Products, Inc., prays that plaintiff takes nothing by its complaint and that it be hence dismissed with its costs.

/s/ JOSEPH H. DASTEEL,
Attorney for Defendant.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed August 22, 1947. [55]

At a stated term, to wit: The September Term, A.D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 29th day of September, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER—SEPT. 29, 1947

For hearing motion of defendant Citizens Nat'l Trust & Savings Bank of L. A. to dismiss the action and for a more definite statement or for a Bill of Particulars, pursuant to notice thereof filed Aug. 15, 1947; Thos. S. Bunn, Esq., present for plaintiff; John N. Cramer, Esq., present for Cit. Nat'l Tr. & Sav. Bank.

Attorney Cramer argues in support of said motion to dismiss and Court denies said motion.

Attorney Cramer now argues in support of motion for a Bill of Particulars, and Court denies said motion as to Items 1, 2, 3, 4, 5, 6, 7, 8, and 10, and grants said motion as to Items 9 and 11, and orders that defendant bank have 20 days from today to serve written interrogatories; that plaintiff shall have 30 days thereafter in which to reply to said written interrogatories as well as to respond to the order for Bill of Particulars in the items hereto-

fore indicated, and that after the service upon the defendant bank of the replies to the written interrogatories, and the Bill of Particulars, the defendant bank shall have 30 days in which to answer or otherwise plead.

Counsel waive all notices. [57]

[Title of District Court and Cause.]

PLAINTIFF'S BILL OF PARTICULARS

(Furnished Pursuant to Defendant Bank's Motion)

The above - entitled Court having heretofore granted the motion of defendant Citizens National Trust and Savings Bank of Los Angeles for an order directing plaintiff to make his complaint herein more definite and certain in respect to Items Nos. 9 and 11 of said motion, plaintiff furnishes this Bill of Particulars in compliance with said order, and alleges:

1. (In reply to defendant bank's Item No. 9.) That the financial loss which resulted to the plaintiff from the bank's negligence in paying for wire without obtaining the prescribed documentary evidence of its proper quantity and condition, to wit, the prescribed clean, order bill of lading, is the same financial loss as that also occasioned by the seller's (Dulien's) breach [83] of warranty as to the good condition and agreed quantity of said wire; but that this same financial loss, in addition to constituting the basis for plaintiff's claim against defendant

bank, alleged in his Second Cause of Action, also constitutes the basis for plaintiff's separate and distinct claim against defendant Dulien for breach of warranty, alleged in his First Cause of Action.

2. (In reply to defendant bank's Item No. 11.) That the first inspection by plaintiff or his agents of any of the wire in question was made by plaintiff himself on Wednesday, July 31st, 1946, at the dock of Moore-McCormack Steamship Lines, Inc., at Terminal Island, California, to which dock a portion of the wire had at an earlier hour on that same day been moved by truck pursuant to order given by Mattoon & Company, the independent shipping agents mentioned in paragraph VII of plaintiff's First Cause of Action on page 5, line 29, of the Complaint. That plaintiff did not then know that defendant bank had not received from defendant Dulien the clean order bill of lading which plaintiff had directed defendant bank to demand and receive.

/s/ THOMAS S. BUNN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed December 30, 1947. [84]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES

The First Cause of Action in the Complaint herein being directed solely to the defendants Dulien Steel Products, Inc., of California, and Dulien Steel Products (in said complaint and hereinafter collectively called Dulien), and the Third Cause of Action being directed solely to defendant Matson Navigation Company (in said complaint and hereinafter called Matson), defendant Citizens National Trust & Savings Bank of Los Angeles (in said complaint and hereinafter called the Bank), files this its answer to the Second alleged Cause of Action in said Complaint directed to it, and answers the same as amplified by plaintiff's Bill of Particulars filed herein December 30, 1947, by admitting, denying and alleging as follows: [86]

First Defense

The Complaint fails to state a claim against defendant Bank upon which relief can be granted.

Second Defense

1. Answering the allegations of paragraph I of the First Cause of Action (incorporated by reference in paragraph I of the Second Cause of Action), defendant Bank admits that plaintiff is a citizen of and resides in the Republic of Colombia, South

America; admits that it is a national banking association organized, created and existing under the laws of the United States of America, and that it has its principal place of business in the City of Los Angeles, County of Los Angeles, State of California. Defendant Bank alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation in said paragraph that plaintiff has no place of business in the United States of America.

2. Answering the allegations of paragraph II of the First Cause of Action (incorporated by reference in the Second Cause of Action by paragraph I thereof), defendant Bank admits the allegation of subparagraph (a) of said paragraph II that at all times in said Complaint mentioned defendant Dulien Steel Products, Inc., of California was and now is a corporation organized and existing under the laws of the State of California, and admits the allegations of subparagraphs (b) and (c) of said paragraph II. Defendant Bank alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations of said paragraph II.

3. Answering the allegations of paragraphs III, IV and V of the First Cause of Action (incorporated by reference in the Second Cause of Action by paragraph I thereof), defendant Bank alleges that it is without knowledge or information sufficient to [87] form a belief as to the truth of the allegations contained in said paragraphs.

4. Answering the allegations of paragraph VI of the First Cause of Action (incorporated by reference in the Second Cause of Action by paragraph I thereof), defendant Bank admits that on July 12, 1946, a written sale order dated July 12, 1946, in the form annexed to said Complaint and marked Exhibit A, was duly signed by defendant Dulien and approved and accepted in writing by plaintiff. Admits that thereafter on July 26, 1946, defendant Dulien orally represented to plaintiff that the shipment of wire would be only 2,300 tons, of which defendant Dulien would retain for itself 300 tons, to which change in quantity plaintiff orally agreed, and thereupon in that manner by said mutual agreement between plaintiff and defendant Dulien the quantity of plaintiff's said purchase was reduced to 2,000 tons. Defendant Bank is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph.

5. Answering the allegations of paragraph VII of the First Cause of Action (incorporated by reference in the Second Cause of Action by paragraph I thereof), defendant Bank admits that said steamship was docked on July 26, 1946, at pier A, at Long Beach, California, Harbor, instead of the Los Angeles Harbor; admits and alleges that on July 27, 1946, plaintiff made a written application to defendant for a letter of credit for \$214,000, on the Bank's usual form for such application, which application was partly printed and partly typewritten;

that a true copy of plaintiff's said application for said letter of credit is annexed to the Complaint and marked "Exhibit 'B' (Face)"; that as a part of the same transaction plaintiff signed and delivered to said Bank an instrument in writing, known commercially as a Letter of Credit Guarantee; that a true copy of said Letter of Credit Guarantee (complete except for plaintiff's signature and the date) is [88] annexed to the Complaint marked "Exhibit 'B' (Back)"; that as a part of the same transaction defendant Bank loaned to plaintiff, at his special instance and request, the sum of \$54,535, and plaintiff orally agreed with defendant Bank to give it a lien upon said wire and to evidence said loan and said lien by a note in writing which plaintiff thereafter did, as more fully appears from the counterclaim hereof; that thereupon defendant Bank made and executed its irrevocable Letter of Credit in the amount of \$214,000, and delivered the same to plaintiff; that a true copy of said Letter of Credit is annexed to the Complaint and marked "Exhibit C"; that the provision in said Application for said Letter of Credit (Exhibit B (Face) to the Complaint) and in said Letter of Credit (Exhibit C to the Complaint) providing that a negotiable or order bill of lading be presented endorsed in blank, was inserted in said Application and said Letter of Credit, at the instance and request of defendant Bank, and not at the instance or request of plaintiff, and said provision was inserted in each of said documents for the sole benefit of defendant Bank as a lienholder on said wire. Defendant Bank fur-

ther alleges that thereafter and on July 29, 1946, defendant Bank released plaintiff from the provisions of said Application for Letter of Credit and of said Letter of Credit providing that a negotiable or order bill of lading should be presented, and plaintiff orally agreed with defendant Bank that a straight or non-negotiable bill of lading might be accepted.

Further answering said paragraph VII, defendant Bank admits that on July 27, 1946, and concurrently with the purchase of said Letter of Credit, plaintiff orally instructed the Bank that upon the Bank's receipt of the documents, it should notify plaintiff's Los Angeles shipping agent, Mattoon & Co., Inc., to ship said wire pursuant to plaintiff's instructions to South America. In this connection defendant Bank denies the allegations of paragraph 2 of said Bill of Particulars that said Mattoon & Co., Inc., was [89] "independent shipping agents." Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph that plaintiff's application for and purchase and receipt of said Letter of Credit was before plaintiff had seen any of said wire.

Defendant Bank denies generally and specifically all the other allegations of paragraph VII.

6. Answering the allegations of paragraph II of the Second Cause of Action, defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations of

said paragraph that the payment by the Bank therein alleged took place before plaintiff had seen any of said wire or before any of said wire had been unloaded from the ship. Admits that on July 29, 1946, defendant Bank paid to defendant Dulien the full purchase price for 2,000 tons of wire in the sum of \$214,000. Denies generally and specifically all the other allegations of said paragraph II.

7. Answering the allegations of paragraph III of said Second Cause of Action, defendant admits that with the full knowledge and written consent of defendant Bank and defendant Dulien plaintiff sold 25 tons of said wire at a price of \$65.00 per ton; admits that 104 tons of said wire was with the written consent of defendants Dulien and the Bank sold at \$4.50 per ton. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the other allegations of the second unnumbered subparagraph of said paragraph.

In this connection, defendant alleges that plaintiff for a valuable consideration in writing agreed with defendant Bank that defendant Bank should not be responsible for the character, quality, quantity, condition or value of the property represented by the documents or for any difference in character, quality, quantity, condition or value of the property from that expressed in [90] the documents, all as appears in paragraph 9 of the Letter of Credit Guarantee, Exhibit B (Back) to the Complaint.

8. Answering the allegations of paragraph IV of the Second Cause of Action, as supplemented by

paragraph 1 of said Bill of Particulars, defendant denies that each and all, or each or all, or any of the special expenses in said paragraph pleaded constitute additional or any loss and damage or any loss or damage as a direct and proximate result or as a direct or proximate result, or any result of the alleged negligence of defendant Bank in the alleged failure to follow plaintiff's instructions and the terms of said Letter of Credit, either as alleged in paragraph II of plaintiff's Second Cause of Action or otherwise or at all. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph IV.

Answering paragraph 1 of said Bill of Particulars, defendant Bank denies that any financial loss whatever resulted to the plaintiff from defendant Bank's alleged negligence in paying Dulien said \$214,000 without obtaining the alleged prescribed documentary evidence, to wit, the alleged prescribed clean order bill of lading.

9. Answering the allegations of paragraph V of the Second Cause of Action, defendant Bank alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph V.

10. Answering the allegations of paragraph VI of the Second Cause of Action, defendant Bank alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph VI.

11. Answering the allegations of paragraph VII of the Second Cause of Action, defendant Bank admits that when plaintiff purchased said Letter of Credit from it on July 27, 1946, plaintiff [91] told said Bank and said Bank knew that plaintiff's purpose in purchasing the wire for payment of which said Letter of Credit was to be used, was to ship said wire to South America for resale. Defendant Bank denies generally and specifically all the other allegations of paragraph VII.

12. Answering the allegations of paragraph VIII of said Second Cause of Action, defendant Bank admits that plaintiff remained in California, away from his own country, for three months. Defendant Bank alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph that plaintiff remained away from his business for three months; that the cost to plaintiff of such stay was \$3,000, and that within that time he expended that sum in living expenses. Defendant Bank denies generally and specifically all the other allegations of said paragraph.

13. Answering the allegations of paragraph IX of said Second Cause of Action, in addition to the matters admitted in paragraph 7 of this Answer, defendant Bank admits that it gave written consents that approximately 1,750 additional tons of said wire might be sold, under an agreement that such consent would be without prejudice to any prior existing rights of either of the parties against

the other. Defendant Bank denies generally and specifically each, all, and every of the allegations of paragraph IX not hereinabove expressly admitted.

14. Answering the allegations of paragraph X of said Second Cause of Action, defendant Bank denies generally and specifically each, all and every of the allegations of said paragraph X.

15. Answering the allegations of paragraph XI of said Second Cause of Action, defendant Bank admits that a part of the purchase price of said \$214,000 Letter of Credit was represented by a loan of \$54,000 made to plaintiff by defendant Bank by its [92] Loan Department, which it was orally agreed between said Bank and plaintiff on the date said Letter of Credit was purchased, to wit, July 27, 1946, could be represented by plaintiff's promissory note to be thereafter executed; admits that plaintiff also agreed to pay the Bank its usual charge of \$535 for such Letter of Credit and for the Bank's service in making payment thereunder; admits that on July 31, 1946, plaintiff signed and delivered to the Bank his promissory note dated July 31, 1946, prepared by the Bank and payable to the Bank, for \$54,535, covering the principal amount of said loan of \$54,000 and the Bank's charge of \$535 for the Bank's said Letter of Credit and the Bank's services; admits that on July 31, 1946, defendant Bank represented that it had paid Dulien's draft for \$214,000 against said Letter of Credit; alleges in this connection that said representation was in all respects true. Defendant Bank

alleges that on July 27, 1946, plaintiff and said defendant Bank in writing agreed that said Bank might accept as bills of lading under said Letter of Credit any documents issued or purporting to be issued by or on behalf of any carrier which acknowledged receipt of property for transportation, whatever the specific provisions of said documents, all as more particularly appears from the provisions of paragraph 6 of said Letter of Credit Guarantee, "Exhibit 'B' (Back)" to the Complaint. Thereafter on July 29, 1946, plaintiff and defendant Bank orally agreed one with the other that the bill of lading referred to in said Letter of Credit and in said Letter of Credit Guarantee might show a consignment from defendant Dulien to defendant Dulien. Defendant Bank admits that plaintiff believed and relied on the representations of defendant Bank, which are hereinabove admitted to have been made; denies generally and specifically all of the other allegations of paragraph XI not hereinabove expressly admitted.

16. Answering the allegations of paragraph XII of said [93] Second Cause of Action, defendant Bank admits that it now holds plaintiff's said promissory note of July 31, 1946, originally for \$54,535; admits that plaintiff is entitled to credit of principal cash payments of \$39,925.90; denies generally and specifically all the other allegations of paragraph XII of said Second Cause of Action. In this connection, defendant Bank alleges that the principal balance due on said note is \$14,609.10,

together with interest at the rate of 5% per annum as follows:

On \$39,694.05 from December 2, 1946, to December 5, 1946;

On \$34,594.05 from December 5, 1946, to December 16, 1946;

On \$29,579.05 from December 16, 1946, to February 10, 1947;

On \$27,333.83 from February 10, 1947, to April 2, 1947;

On \$19,879.37 from April 2, 1947, to May 16, 1947;

On \$19,411.37 from May 16, 1947, to May 27, 1947;

On \$14,609.10 from May 27, 1947, until paid.

Third Defense

1. On July 27, 1946, as a part of the transaction for the purchase of said Letter of Credit, plaintiff made, signed and delivered to said defendant Bank a certain agreement in writing, known commercially as a Letter of Credit Guarantee. In said Letter of Credit Guarantee, plaintiff is referred to as "we" and defendant Bank is referred to as "you." In paragraph 9 thereof it is provided in part as follows:

"In furtherance and extension and not in limitation of the specific provisions hereinbefore set forth, we agree that any action taken by you or by any correspondent of yours under or in connection with the Credit or the relative drafts, documents or property, if taken in good

faith, shall be binding on us and shall not put you or [94] your correspondent under any resulting liability to us; and we make like agreement as to any inaction or omission, unless in breach of good faith."

A true copy of said Letter of Credit Guarantee (except for signature and date) is annexed to the Complaint, marked "Exhibit 'B' (Back)."

2. Each and all of the actions of said defendant Bank, of which complaint is made, were taken in good faith by said defendant Bank. Each and all of said defendant Bank's inactions and omissions, if any there be, were unintentional on its part, and the result of inadvertence and mistake on the part of one of its employees. None of said alleged inactions or omissions was in breach of good faith.

Fourth Defense and by Way of Setoff

1. Defendant Bank is informed and believes, and upon and according to such information and belief alleges, that solely as a result of the payment by it to defendant Dulien of the sum of \$214,000, as alleged in said Complaint, plaintiff obtained possession of, and title to, goods and property, to wit: barbed wire, of great value, to wit, of a value the exact amount of which is to defendant Bank unknown.

Defendant Bank is further informed and believes, and therefore alleges, that plaintiff sold all, or substantially all, of said barbed wire, for large sums of money, to wit, for sums the exact amount of

which is to defendant Bank unknown. Defendant Bank alleges that even if it be otherwise liable on account of the matters set forth in said Complaint, its liability in no event is greater than the excess, if any there be, of (1) the sum of \$214,000 over (2) the larger of the following sums, namely, the actual amount received by plaintiff from the sale of said barbed [95] wire or the fair market value thereof, and defendant Bank claims the amount for which said barbed wire was actually sold, or the fair market value thereof, whichever sum is the larger, as a setoff against any claim of liability of plaintiff against it.

Counterclaim

1. July 31, 1946, plaintiff for valuable consideration to him in hand paid by defendant, made, executed and delivered to, with and in favor of defendant Bank, his promissory note in words and figures as follows, to wit:

“\$54,535.00. Los Angeles, California, July 31, 1946.
No. 64114.

“Thirty days after date, for value received, the undersigned promise(s) to pay to the order of the Citizens National Trust & Savings Bank of Los Angeles, at its office in the City of Los Angeles, California, the sum of Fifty-four Thousand Five Hundred Thirty-five and no/100 Dollars with interest at the rate of 5 per cent per annum from date until paid, interest payable at maturity, and if not punctually paid, it shall become a part of the prin-

cipal, and thereafter bear the same rate of interest as the principal debt; and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable and may be charged to the account in said Bank of either the principal maker, or sureties on said note, at the option of said Bank.

“Should an attorney be employed to collect, or should suit be commenced to enforce the payment of this Note, the undersigned agree(s) to pay a reasonable sum additional as attorney’s fees; also costs of such suit. Principal and interest payable in lawful money of the United States.

“The undersigned hereby deposit(s) with said Bank as collateral security for the payment of this or any other liability or liabilities of the undersigned to said Bank, due or to become [96] due, or that may be hereafter contracted, the following property, viz.:

“2,000 Tons Barbed Wire held at Matson Navigation Company Freight Docks

“the market value of which is now \$., together with all cash dividends, stock dividends, liquidating dividends, stock rights, rights to subscribe, new securities, or other property to which the undersigned is or may hereafter become entitled to receive on account of such property, with this condition, viz.:

“The said Citizens National Trust & Savings Bank of Los Angeles, its successors or assigns, are hereby authorized to cause to be transferred to its

own name or to the name of any other person or corporation as pledgee or trustee or otherwise any certificates of stock, warehouse receipts or other instruments or securities which are now or may hereafter be deposited with it by the undersigned as security as aforesaid, and such transferee may exercise all of the rights and privileges in connection with said securities to which said transferee may be entitled by virtue of being the holder of record thereof in addition to the rights and privileges otherwise granted to said Bank hereunder, but said Bank or said transferee shall not be obliged to exercise any of said rights or privileges.

“All provisions of law, in equity and by statute providing for, relating to, or pertaining to pledges and the sale of pledged property, or which prescribe, prohibit, limit or restrict the right to, or conditions, notice or manner of sale, together with all limitations of law in equity or by statute on the right of attachment in the case of secured obligations, are hereby expressly waived by the undersigned.

“That the Citizens National Trust & Savings Bank of Los Angeles, its successors or assigns, has the right to call for such [97] additional security as it may deem proper, and on failure to respond forthwith to such call, this obligation shall immediately thereupon become due and payable; and on the non-performance of this promise, or on the non-payment of any liability or liabilities above mentioned, the said Bank, through its President or Cashier or other officer, its successors or assigns, is and are hereby

given full power and authority to sell, assign and deliver, or collect the whole or any part of the above named securities, or any substitute therefor, or any addition thereto, at public or private sale, at any time or times hereafter, without any demand, advertisement or notice—such demand, advertisement and notice being hereby expressly waived; and upon such sale the said Citizens National Trust & Savings Bank of Los Angeles, its successors or assigns, may become the purchaser of the whole or any part of such securities, discharged from any right of redemption, and after deducting all legal or other costs and expenses for collection, sale and delivery, may apply the residue of the proceeds of such collections, sale or sales, to pay any, either or all of said liabilities as said Citizens National Trust & Savings Bank of Los Angeles, its successors or assigns, shall deem proper, and in such order of application as it, or its successors or assigns, may elect, returning the overplus to the undersigned. And the undersigned agrees to pay the holder hereof any deficiency upon demand.

“Should this note be signed by more than one person, and/or firm, and/or corporation, all covenants and obligations herein contained shall be considered for all purposes as joint and several covenants and obligations of each signer hereof.

“J. B. LONDONO.

“Address: 408 S. Spring, Rm 305, L.A.”

2. Said note was given as a part of the purchase price of the Letter of Credit in plaintiff's complaint herein mentioned. [98]

3. No part of the principal sum owing on said note has been paid except the sum of \$39,925.90 and there is now due, owing and unpaid from plaintiff to defendant Citizens National Trust & Savings Bank of Los Angeles the principal sum of \$14,609.10, together with interest at the rate of 5% per annum as follows:

On \$39,694.05 from December 2, 1946, to December 5, 1946;

On \$34,594.05 from December 5, 1946, to December 16, 1946;

On \$29,579.05 from December 16, 1946, to February 10, 1947;

On \$27,333.83 from February 10, 1947, to April 2, 1947;

On \$19,879.37 from April 2, 1947, to May 16 1947;

On \$19,411.37 from May 16, 1947, to May 27, 1947;

On \$14,609.10 from May 27, 1947, until paid.

4. Defendant bank has been compelled to retain attorneys to enforce this counterclaim and collect said note, and for that purpose has retained the firm of Cosgrove, Clayton, Cramer & Diether and has incurred an obligation to said attorneys to pay them a reasonable attorneys' fee.

Wherefore, defendant Citizens National Trust & Savings Bank of Los Angeles prays that plaintiff take nothing by his complaint and that defendant Citizens National Trust & Savings Bank of Los Angeles do have and recover judgment against plain-

tiff upon its counterclaim in the amount of \$14,609.10, together with interest thereon at the rate of 5% per anum upon diminishing balances as hereinabove set forth, together with its costs and disbursements herein expended and its reasonable attorneys' fees incurred in prosecuting said counterclaim and for such other and further relief as to the court may seem meet in the premises.

COSGROVE, CLAYTON,
CRAMER & DIETHER,

JOHN N. CRAMER,

LEONARD A. DIETHER,

By /s/ JOHN N. CRAMER,
Attorneys for Defendant, Citizens National Trust &
Savings Bank of Los Angeles.

Receipt of copy acknowledged.

[Endorsed]: Filed January 28, 1948. [99]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO COUNTERCLAIM
OF DEFENDANT CITIZENS NATIONAL
TRUST & SAVINGS BANK OF LOS AN-
GELES

Comes Now the plaintiff and by way of reply to the counterclaim of defendant Citizens National Trust & Savings Bank of Los Angeles, hereinafter called the "Bank," admits, denies and alleges as follows:

I.

Replying to paragraphs 1 and 2 of said counterclaim plaintiff admits that on July 31, 1946, he made, executed and delivered to the bank his promissory note in the words and figures set forth in said counterclaim and that said note was given as part of the purchase price of the letter of credit mentioned in the complaint and a copy of which is attached to the complaint marked Exhibit "C"; but replying to paragraph 3 of the counterclaim [101] plaintiff denies that only \$39,925.90 has been paid upon the principal thereof and alleges that \$888.55 which the bank on its books has credited to interest should have been credited to principal, and that with due allowance thereof upon principal there has been paid upon the principal of said note the sum of \$40,814.45; and replying to paragraph 4 of the counterclaim plaintiff denies the implied allegation therein contained that by reason of failure of plaintiff to perform his obligations the bank has been compelled to retain attorneys to enforce said counterclaim or collect said note; and as further defenses to said counterclaim and to said note plaintiff alleges as follows:

First Defense

Plaintiff alleges that said note was made, executed and delivered by plaintiff to the bank without consideration.

Second Defense

Plaintiff alleges that the consideration, if any, for said note failed by reason of the following facts:

The consideration for which said note was given was (1) the written promise of the bank, as contained in the letter of credit, copy of which is attached to the complaint herein and is marked Exhibit "C" and in the application therefor, a copy of which is likewise attached to the complaint and marked Exhibit "B," that the bank would pay to defendant Dulien \$54,000.00 of the proceeds of said note, along with \$160,000.00 of additional funds furnished to the bank by plaintiff, upon the receipt by the bank from defendant Dulien of Dulien's sight drafts accompanied by a full set of clean on board ocean bills of lading made out to order, endorsed in blank and marked freight prepaid, and by commercial invoices evidencing shipment of 2,000 tons of barbed wire in one shipment, invoiced on basis of c.i.f. Los Angeles Harbor, to be shipped from Honolulu, Hawaii, to Los Angeles Harbor, and would apply the remaining \$535.00 of the proceeds of said note to the payment of the bank's [102] charge for handling the letter of credit transaction, and (2) the bank's representation made to plaintiff on July 31, 1946, simultaneously with plaintiff's execution and delivery of said note, that the bank had received the required bills of lading and had paid defendant Dulien's drafts for \$214,000.00 against said letter of credit; and two days prior to the date of the execution and delivery of said note by plaintiff to the bank the consideration therefor had already fully failed, although plaintiff did not then know it, in that the bank had on July 29, 1946, paid to defendant Dulien

said sum of \$54,000.00 plus said additional \$160,000.00 without having received from defendant Dulien any bill of lading whatever, and the barbed wire which was thereafter delivered and made available to plaintiff in consideration of such payment by the bank to Dulien was badly rusted and unmerchantable and inferior in all respects to that which plaintiff had ordered and agreed to pay Dulien for, as set forth in sale order, copy of which is attached to the complaint marked Exhibit "A"; and plaintiff's loss on account of the bank's said violation of plaintiff's said instructions and the bank's said agreement exceeded by a substantial amount, to wit, by more than \$100,000.00, the total sum claimed by defendant bank on its counterclaim—all as is more fully set forth and alleged in plaintiff's second cause of action in the complaint herein and in the plaintiff's answers to defendant bank's interrogatories on file herein.

Third Defense

Plaintiff alleges that there has been paid to and received by the bank upon said note the total sum of \$40,814.45; that by reason of the fact that the consideration for said note failed, as is above alleged in plaintiff's second defense, no interest whatever accrued or will accrue upon said note and therefore the total sum of all payments made upon said note, to wit: [103] the sum of \$40,814.45, constitutes a reduction of the amount of the principal thereof; and that for the same reason, to wit: the failure of consideration for said note, plaintiff is also entitled

to credit upon said note in the amount of the bank's said service charge of \$535.00; and that full allowance for said credits to which plaintiff is so entitled leaves now unpaid upon said note only the sum of \$13,185.55 principal, with which said sum defendant bank is entitled to be credited upon the full amount of plaintiff's claim as said claim is set forth in the complaint, but only in the event of the allowance of plaintiff's said claim in full as so alleged in the complaint.

Fourth Defense

Plaintiff alleges that the necessity for the bank's retention of attorneys to enforce its alleged counterclaim and to collect the promissory note upon which said counterclaim is based was occasioned, if at all, solely by the negligence of the bank in its failure to comply with plaintiff's instructions in said letter of credit and application therefor, as above alleged, and that no sum whatsoever is due or owing to the bank, or is or will be properly allowable by this Court to the bank, on account of attorneys' fees.

Wherefore, plaintiff prays that the defendant Citizens National Trust & Savings Bank of Los Angeles take nothing by its said counterclaim, and that plaintiff have judgment against said defendant bank as prayed for in the complaint.

Dated: February 18, 1948.

/s/ THOMAS S. BUNN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 19, 1948. [104].

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

We hereby substitute and appoint Brobeck, Phleger & Harrison as our attorneys in the above-entitled action in the place and stead of James M. Carter, United States Attorney, and Bernard B. Laven, [106] Assistant United States Attorney.

Dated: July 14, 1948.

Matson Navigation Company,

By /s/ [Indistinguishable],

Secretary;

Defendant.

We hereby agree to the foregoing substitution.

Dated July 19, 1948.

/s/ JAMES M. CARTER,

/s/ BERNARD B. LAVEN.

We agree to accept the foregoing substitution.

Dated July 14, 1948.

BROBECK, PHLEGER &
HARRISON,

By /s/ MOSES LASKY.

[Endorsed]: Filed July 20, 1948. [107]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT MATSON
NAVIGATION COMPANY

Defendant Matson Navigation Company (hereinafter sometimes referred to as "this defendant"), answers plaintiff's Complaint as follows: [108]

* * *

VIII.

This defendant admits the allegations contained in paragraph II of plaintiff's second alleged cause of action as incorporated in paragraph I of plaintiff's third alleged cause of action.

IX.

Answering the allegations contained in [111] paragraph III of plaintiff's second alleged cause of action as incorporated in paragraph I of plaintiff's third alleged cause of action, this defendant denies that the entire lot of barbed wire unloaded from said SS White Squall was badly rusted and/or unmerchantable but admits that some of said wire was rusted, the exact amount being unknown to this defendant, and in that behalf alleges that said rusting occurred prior to shipment aboard the said SS White Squall, and that at all times mentioned in the complaint and at all pertinent times the condition of all of said wire was well and truly known to defendant Dulien (as said term "defendant Dulien" is defined in paragraph II of plaintiff's first alleged cause of action, and which

said term is at all times hereinafter used as so defined);

* * *

X.

Answering the allegations contained in paragraph II of plaintiff's third alleged cause of action, [112] this defendant * * * admits that plaintiff does not have and never has had said bill of lading or any copy thereof; * * * admits that said bill of lading was what is in the shipping business known as a straight clean bill of lading showing on its face that defendant Dulien was both the shipper and the consignee, and that said wire had been received from the shipper (Dulien) in apparent good order and condition except as therein otherwise noted and that there were no exceptions noted on said bill of lading. [113]

* * *

XI.

Answering the allegations contained in paragraph III of plaintiff's third alleged cause of action, this defendant admits that said bill of lading consisted of a printed form into which there had been typed certain information applicable to this particular shipment, showing, among other things, name of shipper, name of ship, name of consignee and quantity of wire delivered to the carrier; admits that thereafter a freight bill upon a printed form was issued by this defendant containing in type-writing certain information copied from said bill of lading, and that said freight bill did not contain any exceptions or notations of exceptions to the

“good order and condition” of said wire, and in that behalf alleges that this defendant, either acting for itself or as agent for said United States of America, was under no obligation by law, custom or otherwise to indicate on said freight bill the condition of this shipment or of any shipment carried by it; admits that the copy of the freight bill attached to the complaint, marked “Exhibit D,” is a true copy of said freight bill; admits that when defendant Dulien presented to defendant Bank Dulien’s drafts for \$214,000 drawn against the plaintiff’s letter of credit, said drafts were accompanied by the said freight bill instead of a clean order bill of lading specified in and required by plaintiff’s instructions to defendant Bank and by the terms of said letter of credit, and that said defendant Bank carelessly and negligently [114] mistook said freight bill for the required bill of lading and paid said \$214,000 to defendant Dulien thereon; [115]

* * *

Sixth Defense

I.

The bill of lading actually issued for the shipment described in said complaint, which said bill of lading is annexed hereto as “Exhibit B,” and made a part hereof, showed on its face that it was a straight bill of lading, that is, a bill of lading wherein the shipper and consignee were the same party, and wherein the shipment was not to the order of the shipper but was non-negotiable; by

reason thereof, this defendant, either individually, or as the agent for the United States of America, was under no duty by statute, rule of law, or otherwise to indicate thereon the condition or quality of the shipment carried on said vessel.

* * *

Eighth Defense

I.

Even if this defendant, either individually or as agent for the United States of America, issued a false [117] bill of lading, as alleged by the plaintiff in paragraph III of plaintiff's third alleged cause of action, this defendant alleges that at no time, in connection with any of the transactions mentioned in the complaint, did said plaintiff rely in any manner whatsoever upon the statements or any statement contained in said bill of lading, and in fact said plaintiff in said complaint admits that he has never seen or had possession of said bill of lading, or even of a copy thereof, and as a consequence there could have been no reliance by said plaintiff upon any of the terms of said bill of [118] lading.

* * *

Tenth Defense

I.

The contract of carriage for the shipment described in the complaint represented by the bill of lading, attached hereto and marked "Exhibit B," was one between this defendant as agent for the United States of America and defendant Dulien, which said contract was for the carriage of the ship-

ment therein described from Honolulu to Los Angeles; said contract between this defendant, as such agent, and Dulien was fully performed and completed by this defendant prior to the assignment, if any, or purported assignment of said bill of lading to the plaintiff, and by reason thereof, plaintiff did not acquire and could not acquire any rights whatsoever against this defendant, either individually or as agent of the United States of America, and in that behalf this defendant further alleges that by issuing at Dulien's request, a straight bill of lading wherein the shipper and the consignee were the same party, this defendant had no reason, and by the exercise of reasonable care could have no reason, to believe that defendant Dulien could or would attempt to assign or negotiate said bill of lading to any third party. [119]

* * *

Twelfth Defense

I.

Even if all of the matters alleged in the complaint against this defendant are true, it appears from the face of the complaint that the plaintiff could not have suffered any loss without the negligence of defendant Bank in failing to obtain from defendant Dulien the documents called for by the application for commercial letter of credit, annexed to the complaint as "Exhibit B," and by the letter of credit, annexed to the complaint as "Exhibit C."

Wherefore, this defendants prays that plaintiff

take nothing by his complaint herein, and that this defendant be hence dismissed with its cost of suit.

BROBECK, PHLEGER &
HARRISON,

MORROW & TRIPPET,

By /s/ T. H. MORROW,

Attorneys for Defendant Matson Navigation Company.

[Endorsed]: Filed September 15, 1948. [120]

[Title of District Court and Cause.]

CROSS-COMPLAINT OF CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES

Comes Now the defendant, Citizens National Trust & Savings Bank of Los Angeles (hereinafter called the Bank) and for a [141] cross-claim against plaintiff, J. B. Londono, and against defendants, Dulien Steel Products, Inc., of California, a corporation; Dulien Steel Products, Inc., a corporation; Matson Navigation Company, a corporation, et al., by leave of court first had and obtained, files this, its cross-complaint and alleges:

1. In the first cause of action in the complaint herein, plaintiff and cross-defendant, J. B. Londono (hereinafter called plaintiff), made a claim against defendants, Dulien Steel Products, Inc., of

California, a corporation, and Dulien Steel Products, Inc., a corporation, hereinafter referred to jointly and severally as Dulien, and prayed for judgment against said defendant in the sum of \$197,552.66 plus interest. For the particulars thereof reference is made to the First Cause of Action in said complaint contained.

2. In the Second Cause of Action of said complaint, plaintiff made a claim against defendant and cross-complainant, Citizens National Trust & Savings Bank of Los Angeles, a national banking association, and prayed for judgment against said defendant in the sum of \$184,367.11 plus interest. For the particulars thereof reference is made to said Second Cause of Action.

3. In the Third Cause of Action in said complaint, plaintiff made a claim against defendant, Matson Navigation Company, a corporation, and prayed for judgment against said defendant in the sum of \$131,552.66 plus interest. For the particulars thereof reference is made to said Third Cause of Action.

4. On or about July 26, 1948, plaintiff and cross-defendant herein filed a libel in personam in admiralty against United States of America, United States Maritime Commission and War Shipping Administration, hereinafter referred to as respondents, entitled J. B. Londono, Libelant, v. United States of America, et al., Respondents, and numbered 8482 P.H. in the files of this court,

in which and whereby plaintiff and cross-defendant herein [142] as libelant therein, sought judgment for damages against said respondents in the sum of \$131,552.66 plus interest. By order of this court, said libel in personam has been consolidated with this action. The libel in personam charges the respondents as principals for the acts alleged to have been done in said Third Cause of Action by defendant and cross-complainant, Matson Navigation Company, as agent. For further particulars, reference is made to said libel in personam.

5. As appears from an inspection of the complaint herein and of said libel in personam, plaintiff in seeking damages against defendant Dulien for alleged breach of warranty in the sale of certain barbed wire, and is seeking damages against defendant, Matson Navigation Company, and respondents in said libel in personam, for the issuance of an alleged false bill of lading covering said barbed wire. Plaintiff's claim against defendant Bank is for the alleged disobedience by said Bank in paying defendant Dulien for said wire without first having obtained a clean order bill of lading covering said wire. If plaintiff has any cause of action against defendants, Dulien and Matson Navigation Company (hereinafter referred to as other defendants), and said respondents, or any one or more of them, such cause of action exists in plaintiff because, and only because, plaintiff became the owner of said barbed wire by reason of the said payment by defendant Bank.

6. If plaintiff shall recover judgment against

the other defendants and said respondents, or any one or more of them, and if plaintiff shall also recover judgment against Bank, then to the extent that Bank shall satisfy said judgment against it, said Bank will be entitled to be subrogated to the rights of plaintiff against each of the other defendants and said respondents, and any moneys paid by the other defendants and said respondents, or any one or more of them, on account of any judgment which may be rendered in plaintiff's favor against said other defendants and said [143] respondents, or any one or more of them, if paid before satisfaction by Bank of any judgment plaintiff may recover against it, should, after deducting plaintiff's court costs, be deducted from any judgment against Bank; and if paid after Bank shall have satisfied any judgment against it, the amount of such payments, after deducting plaintiff's court costs, should be held by plaintiff as trustee for, and paid over to, Bank and any payment made by Bank on account of any judgment recovered by plaintiff against it should not be credited against, or used to satisfy, wholly or partially any judgment against said other defendants, or any one or more of them.

Wherefore, defendant and cross-complainant, Citizens National Trust & Savings Bank of Los Angeles, prays the court that in the event, but only in the event, plaintiff herein shall recover judgment against it and also shall recover judgment against defendants, Dulien and Matson Navi-

gation Company, and the respondents in said libel in personam, United States of America, United States Maritime Commission, and War Shipping Administration, or any one or more of them, it shall be declared and adjudged by this court:

1. That any moneys collected by plaintiff on account of any judgments against said other defendants and said respondents, or any one or more of them, if paid before payment by Bank on account of any judgment against it, be applied, after first deducting plaintiff's court costs in the partial or total satisfaction of any judgment against Bank;

2. That any moneys collected by plaintiff on account of any judgments against said other defendants and said respondents, or any one or more of them, if paid after the satisfaction by said Bank of any judgment against it, shall, after deducting plaintiff's court costs, be held by plaintiff as trustee for, and be paid to, Bank, that Bank subrogated to plaintiff's rights [144] in the premises, and that no payments made by defendant Bank on account of any judgment recovered by plaintiff against it, shall be credited against or used to satisfy wholly or partially any judgment against said other defendants, or any one or more of them; and

3. For such other and further relief as to the

court may seem just and equitable, the premiss considered.

COSGROVE, CLAYTON,
CRAMER & DIETHER,

By /s/ JOHN N. CRAMER,
Attorneys for Defendant and Cross-Complainant,
Citizens National Trust & Savings Bank of
Los Angeles.

[Endorsed]: Filed February 14, 1949. [145]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between defendant and cross-complainant, Citizens National Trust & Savings Bank of Los Angeles, [146] and defendant and cross-defendant, Dulien Steel Products, Inc., of California, a corporation, and defendant and cross-defendant, Dulien Steel Products, Inc., a corporation, by and through their respective counsel, that the allegations of the cross-complaint filed herein by said defendant and cross-complainant shall be deemed denied so far as said defendants and cross-defendants and each of them are concerned and that said defendants and cross-defendants, and each of them, need not file a formal answer to said cross-complaint.

It Is Further Stipulated that this stipulation may be made a part of the judgment roll herein.

Dated February 16th, 1949.

/s/ JOSEPH H. DASTEEL,
Attorney for Defendants and
Cross-Defendants.

COSGROVE, CLAYTON,
CRAMER & DIETHER,

By /s/ LEONARD A. DIETHER,
Attorneys for Defendant and
Cross-Complainant.

ORDER

It Is So Ordered. 2/18/49.

PEIRSON M. HALL,
Judge of the District Court.

[Endorsed]: Filed February 18, 1949. [147]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between J. B. Londono, plaintiff and cross-defendant herein, and the Citizens National [150] Trust & Savings Bank of Los Angeles, cross-complainant, that the allegations of the cross-complaint heretofore filed herein by said Bank against J. B. Londono, plaintiff and cross-defendant, and Dulien Steel Products, Inc., of California, Dulien Steel Products, Inc., and

Matson Navigation Company, defendants and cross-defendants, shall be deemed denied by plaintiff and cross-defendant J. B. Londono, and that plaintiff and cross-defendant J. B. Londono need not file a formal answer to said cross-complaint.

It Is Further Stipulated that this stipulation may be made a part of the judgment roll herein.

Dated March 7th, 1949.

/s/ THOMAS S. BUNN,
Attorney for J. B. Londono, Plaintiff and Cross-Defendant.

COSGROVE, CLAYTON,
CRAMER & DIETHER,

By /s/ LEONARD A. DIETHER,
Attorneys for Defendant and Cross-Complainant
Citizens National Trust & Savings Bank of Los
Angeles.

ORDER

It Is So Ordered. 3/11/49.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed March 14, 1949. [151]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF DEFENDANT
CITIZENS NATIONAL TRUST & SAV-
INGS BANK OF LOS ANGELES

Comes now the defendant Citizens National Trust & Saving Bank of Los Angeles and, leave of Court being first had and obtained, files this its amendment to its answer and admits, denies and alleges as follows:

1. Paragraph 7 of the second defense of said answer (page 5, line 18, to page 6, line 2), is hereby stricken in its entirety and in lieu thereof the following new paragraph 7 is hereby substituted:

7. Answering the allegations of paragraph III of said Second Cause of Action, defendant admits that on September 27, 1946, with the full knowledge and written consent of defendant Bank and defendant Dulien, plaintiff [159] sold 25 tons of said wire at a price of \$65.00 per ton; admits that on April 25, 1947, 104 tons of said wire was, with the written consent of defendants Dulien and the Bank, sold at \$4.50 per ton. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the other allegations of the second unnumbered subparagraph of said paragraph.

In this connection, defendant alleges that plaintiff for a valuable consideration in writing agreed with defendant Bank that defendant Bank should not be responsible for the charac-

ter, quality, quantity, condition or value of the property represented by the documents or for any difference in character, quality, quantity, condition or value of the property from that expressed in the documents, all as appears in paragraph 9 of the Letter of Credit Guarantee, Exhibit B (back) to the Complaint.

2. Paragraph 13 of said second defense of said answer (page 7, lines 16 to 24, both inclusive), is hereby stricken in its entirety and in lieu thereof the following new paragraph 13 is hereby substituted:

13. Answering the allegations of paragraph IX of said Second Cause of Action, defendant Bank admits that on September 18, 1946, it gave a written consent that plaintiff should negotiate for the sale of approximately 1,000 tons of said wire without prejudice to the prior existing rights of any of the parties against the other. A true copy of said written consent is annexed hereto, marked Exhibit "A," and made a part hereof as if fully set out at length in the body of this answer. Defendant Bank alleges that the 25 tons and the 104 tons of said wire mentioned in paragraph III of the Second Cause of [160] Action of said complaint and referred to in paragraph 7 of the answer, as amended, were parts of said quantity of approximately 1,000 tons. Defendant Bank denies generally and specifically each, all and every

of the allegations of paragraph IX not herein-above expressly admitted.

3. A new defense entitled "Fifth Separate and Complete Defense" is hereby added to said answer following the Fourth Defense at page 11, line 5, as follows:

Fifth Separate and Complete Defense

1. Defendant Bank refers to and incorporates by reference the admissions and denials of paragraphs 7 and 13 of its answer as amended, and makes such allegations and denials a part of this Fifth Separate and Complete Defense as if repeated at length herein.

2. If the payment by defendant Bank to Dulien of the sum of \$214,000 alleged in paragraph II of said Second Cause of Action were in disregard and violation of the terms of said letter of credit and the instructions given defendant Bank by plaintiff and in plaintiff's application therefor, as further alleged in said paragraph II, then plaintiff knew or ought to have known such alleged disregard and violation on or about July 29, 1946. Thereafter, and on or about July 31, 1946, plaintiff, with full knowledge of the quality and condition of the barbed wire, referred to in, and as alleged in, said complaint, accepted said wire and thereafter and prior to September 18, 1946, appropriated a portion of the same, to wit: more than 500 tons thereof, to his own use as owner thereof. At the time plaintiff accepted

said wire and at the time he appropriated said portion thereof to his own use as hereinabove alleged, [161] there was no agreement between him and defendant Bank that his said acceptance and appropriation should be without prejudice to any existing rights of either plaintiff or defendant Bank against the other, or any other agreement of like tenor or effect. Plaintiff so accepted and appropriated said wire as the owner thereof because and only because, as he then well knew, the act of defendant Bank in paying to defendant Dulien the said sum of \$214,000 had caused title to said wire to pass to plaintiff.

3. Defendant Bank alleges that by reason of the foregoing facts plaintiff was and is estopped to assert or claim the damages alleged in the complaint against defendant Bank by reason of the alleged fact that defendant Bank paid out said sum of \$214,000 to defendant Dulien in disregard or violation of said letter of credit or the instructions given by plaintiff to defendant Bank, and defendant Bank prays the judgment of this Court whether plaintiff, having accepted said wire and appropriated to his own use portions thereof as owner thereof, ought to be allowed to claim or assert that defendant Bank, by making the very payment which enabled him successfully to assert ownership to said portions of said wire, is liable for damages to plaintiff as alleged in said complaint.

Wherefore, defendant Bank prays judgment as

in its answer and in its cross-complaint herein set forth.

COSGROVE, CRAMER,
DIETHER & RINDGE,

By /s/ JOHN N. CRAMER,

Attorneys for Defendant Citizens National Trust
& Savings Bank of Los Angeles. [162]

EXHIBIT A

(Letterhead)

Thomas S. Bunn

Dulien Steel Products, Inc.,

11611 South Alameda,

Los Angeles, California;

Matson Navigation Company,

523 West Sixth Street,

Los Angeles, California;

Citizens National Trust & Savings Bank,

457 South Spring Street,

Los Angeles 13, California.

Gentlemen:

This letter will confirm the understanding reached yesterday between Dulien Steel Products, Inc., J. B. Londono, Matson Navigation Company and the Citizens National Trust and Savings Bank of Los Angeles, that, adverse and conflicting claims exist among the undersigned growing out of the purchase, sale, shipment, delivery, condition and ownership of barbed wire shipped by Dulien to Los Angeles, of which approximately 1,000 tons now remain on the dock at Pier A in Long Beach; that Londono, acting in the interest of all the undersigned, shall

forthwith negotiate for the sale of said approximately 1,000 tons of said barbed wire, but shall actually sell the same only with the written approval of each of the undersigned as to prices, terms and conditions of sale; that the net proceeds of such sale or sales shall be first paid to Londono and applied by him to the extent necessary upon his indebtedness to the undersigned bank; and that this agreement and such sale shall be wholly without prejudice to the rights, claims, denials, and defenses of each of the undersigned against the others or any of them in respect to said adverse and conflicting claims.

Very truly yours,

/s/ THOMAS S. BUNN,

Attorney for J. B. Londono.

CITIZENS NAT'L TRUST &
SAVINGS BANK,

By /s/ H. D. IVEY,

Pres.

Approved and Agreed to:

DULIEN STEEL PRODUCTS
INC.,

By /s/ E. S. GRENSTEIN.

US MARITIME COMMISSION,
MATSON NAVIGATION COM-
PANY,

Berth Agents;

By /s/ J. B. BANNING, JR.

Receipt of copy acknowledged.

[Endorsed]: Filed January 16, 1950. [164]

[Title of District Court and Cause.]

CROSS-COMPLAINT OF MATSON NAVIGATION COMPANY

Defendant and cross-defendant Matson Navigation Company (hereinafter called Matson), for a cross-claim against defendants and cross-defendants Dulien Steel Products, Inc., of California, a corporation, and Dulien Steel Products, Inc., a corporation, by stipulation of counsel and by leave of court first had and obtained, files this its cross-complaint and alleges as follows:

1. In the third alleged cause of action set forth in the Complaint of the plaintiff herein, the said plaintiff purports to assert a claim against Matson based upon the alleged issuance by Matson of an allegedly false bill of lading; reference is hereby made to said third alleged cause of action for the particulars and details thereof.

2. The shipment of barbed wire referred to in plaintiff's Complaint was made by defendant Dulien (as said term "defendant Dulien" is defined in paragraph II of plaintiff's first alleged cause of action and which said term is at all times hereinafter used as so defined), through one Lacy Hofius, who at all pertinent times was acting as the duly authorized agent of Dulien. Said Dulien and said Hofius, at the time that the latter caused the shipment of said wire to be made, both knew the actual condition and quality of all of said wire and also knew the amount thereof. Neither said Dulien nor

said Hofius at any time disclosed to Matson the actual condition and/or quality of said wire. Said Hofius personally prepared the bills of lading for said wire issued by Matson in its capacity as agent for the United States of America as such capacity is more particularly described in Matson's Answer herein, reference to which is hereby made. Said bills of lading including the bill of lading referred [174] to in plaintiff's Complaint and Matson's Answer, were presented by said Hofius to Matson's agent in Honolulu, Castle & Cooke, Ltd., completely filled out in all respects except for the amount of the freight charges which were thereupon inserted by said Castle & Cooke, Ltd., and thereafter said bills of lading were signed by one R. Arciero, an employee of said Castle & Cooke, Ltd., on behalf of Matson as agent for the master of the vessel and handed to said Hofius. At the time that said bill of lading was so executed and delivered to said Hofius, no officer, agent or employee of Matson had actually seen said wire or had an opportunity to check the quantities inserted therein by said Hofius.

3. By reason of the foregoing, if the plaintiff herein should recover a judgment against Matson, it is entitled to be reimbursed by Dulien for any amounts which it is compelled to pay to the plaintiff in satisfaction thereof.

Wherefore, defendant, cross-defendant and cross-complainant Matson Navigation Company prays judgment that, in the event that plaintiff herein shall recover judgment against it and it shall be

compelled to pay any amounts to the plaintiff in satisfaction thereof, it may recover same from defendant and cross-defendant Dulien and that it may have such other and further relief as to the court may seem just and proper in the premises.

BROBECK, PHLEGER &
HARRISON,

MORROW & TRIPPET,

By /s/ JOHN C. MORROW,

Attorneys for Defendant, Cross-Defendant and
Cross-Complainant Matson Navigation Com-
pany.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1950. [175]

[Title of District Court and Cause.]

STIPULATION WAIVING ANSWER TO
CROSS-COMPLAINT OF MATSON NAVI-
GATION COMPANY

It Is Hereby Stipulated by and between defend-
ant and cross-complainant Matson Navigation Com-
pany and defendants and cross-defendants Dulien
Steel Products, Inc., of California and Dulien Steel
Products, Inc., that no Answer to the Cross-Com-
plaint of Matson Navigation Company need be
served or filed, and that each and all of the allega-

tions of said Cross-Complaint may be deemed denied by said cross-defendants and each of them.

Dated February 13, 1950.

BROBECK, PHLEGER &
HARRISON,

MORROW & TRIPPET,

By /s/ JOHN C. MORROW,
Attorneys for Defendant and Cross-Complainant
Matson Navigation Company.

/s/ JOSEPH H. DASTEEL,
Attorney for Defendants and Cross-Defendants
Dulien Steel Products, Inc., of California and
Dulien Steel Products, Inc.

[Endorsed]: Filed February 13, 1950. [178]

[Title of District Court and Cause.]

PRETRIAL MEMORANDUM OF DEFENDANT,
DULIEN STEEL PRODUCTS, INC., OF
CALIFORNIA

Comes Now the Defendant, Dulien Steel Products, Inc., in [179] the Above Numbered Action and Files This His Pretrial Statement of Issues, Together With Authorities as Follows:

I.

Plaintiff Alleges That the Barbed Wire Sold by Defendant Was Purchased by Sample, This Is Not

True, on the Contrary, the Evidence Will Show That the Plaintiff in Writing (See Exhibit "A" of Plaintiff's Complaint) Bargained With the Defendant Dulien Steel Products, Inc., for the Purchase of "Unused Government Surplus Barbed Wire, as Purchased by Seller, Dulien Steel Products, Inc., from Interior Department (U. S.).

The Evidence Will Show Further That This Is Exactly What the Plaintiff Received. [180]

* * *

List of Witnesses and Exhibits to Be Offered in Evidence by Defendant Dulien Steel Products, Inc.

It is obvious that defendant cannot be certain List of Witnesses and Exhibits to Be Offered in the trial until plaintiff has rested. It is self-evident that in any litigation the plaintiff in advance of trial is better prepared than any defendant to state what evidence will be offered. However, it is now the best judgment of defendant, Dulien Steel Products, Inc., that the following exhibits will be offered on its behalf and the following witnesses will be called: [182]

* * *

Exhibits:

* * *

Bill of Lading dated July 2, 1946, issued by Matson Navigation Company and consigned to Dulien Steel Products, of California.

* * *

Letter of Credit dated July 27, 1946, issued by Citizens Bank to Dulien Steel Products, Inc.

Invoice of Dulien Steel Products, Inc., dated July 29, 1946, showing sale of 2000 tons of barbed wire to J. B. Londono.

Cashier's check of Citizens Bank dated July 29, 1946, payable to Dulien Steel Products, Inc.

* * *

Letter of July 29, 1946, from Dulien Steel Products, Inc., [183] to Mattoon & Co.

* * *

Letter of August 28, 1946, from L. P. Stanley, Dulien Steel Products, Inc., to Matson Navigation Company.

* * *

Letter dated September 10, 1946, and signed by Bank on September 18, 1946, signed by Dulien Steel Products, [184] Inc., Matson Navigation Company and Citizens Bank.

JOSEPH H. DASTEEL,

/s/ JOSEPH H. DASTEEL,

Joseph H Dasteel, Attorney for Dulien Steel Products, Inc., of California, a Corporation, and Dulien Steel Products, Inc., a Corporation, Defendants.

[Endorsed]: Filed February 13, 1950. [185]

[Title of District Court and Cause.]

PRE-TRIAL STATEMENT AND POINTS AND
AUTHORITIES OF PLAINTIFF AND
LIBELANT J. B. LONDONO

Statement of Facts

Plaintiff and libelant, hereinafter called "Londono," agreed to purchase from defendant Dulien, and Dulien agreed to sell to him, 2700 tons (but later by admitted agreement reduced to 2000 tons), of barbed wire at \$107.00 per ton, or a total of \$214,000.00. The sale order referred to the wire as "unused Government surplus barbed wire, as purchased by seller from Interior Department"; but [186] the sale was made upon actual samples of good wire free from rust and upon Dulien's representations that said wire belonged to Dulien and was then in transit from Honolulu on the Matson steamship White Squall, and that it was good wire in all respects equal in quality to said samples.

* * *

The wire delivered to Londono by defendant Matson was 81 tons short and was obviously so badly rusted that none of it was worth the Los Angeles market price for wire such as was warranted. [187]

* * *

Londono in his first cause of action sues Dulien for damages for breach of warranty; in his second cause of action he sues the bank for damages for unauthorized payment of the \$214,000.00 without ob-

taining the required clean order bill of lading; and in his third cause of action he sues Matson for damages for negligence in issuing and putting into circulation to Londono's detriment a false bill of lading, and a freight bill which enabled the bank to mistake it for a bill of lading and thereby make the mistake of unauthorized payment; and in the Admiralty suit he sues the United States, the War Shipping Administration and the United States Maritime Commission for the same liability, as principals, as Matson had as agent, i.e. for the tort of issuance of a false bill of lading.

* * *

Issues

I.

(Against Dulien)

Dulien is liable to Londono for false representations and breach of warranty as to the quantity, quality and condition of the wire. [189]

* * *

Points and Authorities

I.

(Dulien)

Remedies for Breach of Warranty:

Sec. 1789. "(1) Where there is a breach of warranty by the seller, the buyer may, at his election: [191]

"(b) (Damages) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

“(6) (Measure of damages.) The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

“(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.”

Sec. 1790. “Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.” [192]

* * *

V.

(Matson and United States)

The Carrier Was Under a Duty to Cause the Bill of Lading to Correctly Show “the Apparent Order and Condition of the Goods.”

While this duty had existed at common law it was specifically declared:

1. By Harter Act (February 13, 1893) 46 U.S.C.A. Sec. 193;
2. By Federal Bill of Lading Act (August 29, 1916) 49 U.S.C.A. Sec. 102, p. 409; and

3. By Carriage of Goods by Sea Act (April 16, 1936) 46 U.S.C.A. Sec. 1303(3)(c), p. 850, and by the provisions of 46 U.S.C.A. 1303(4), the latter did not repeal or limit the application of 49 U.S.C.A. Sec. 102; and for a failure to perform that duty the carrier is liable to (a) the owner of the goods covered by a straight bill * * * (Londono in this case because upon the bank's unauthorized payment he perforce became the owner thereof although against his will), or (b) the holder of [195] an order bill, who has given value in good faith, relying upon the description therein of the goods for damages caused by * * * their failure to correspond with the description thereof in the bill at the time of the issue. (49 U.S.C.A. 102). [196]

* * *

Dated February 13, 1950.

Respectfully submitted,

/s/ THOMAS S. BUNN,

Attorney for J. B. Londono,
Plaintiff and Libelant.

[Endorsed]: Filed February 13, 1950. [203]

[Title of District Court and Cause.]

SECOND AMENDMENT TO ANSWER OF DEFENDANT CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES

Comes now the defendant, Citizens National Trust & Savings Bank of Los Angeles, and leave of Court being first had and obtained, files this its Second Amendment to its Answer, and alleges:

Sixth Separate and Complete Defense

1. On July 20, 1946, a bill of lading, designated L.A. 29, dated July 12, 1946, covering the shipment of wire mentioned in Paragraph VI of the First Cause of Action in the Complaint herein, incorporated in plaintiff's Second Cause of Action by Paragraph I thereof, was issued to defendant Dulien. Said bill of [216] lading was not for 2,000 tons of barbed wire, the amount of barbed wire mentioned in the modification agreement between plaintiff and defendant Dulien, as alleged in said Paragraph VI, and as admitted in Paragraph 4 of the second defense of defendant's said answer, but on the contrary, was for 4,599,948 pounds of barbed wire, or approximately 2,300 tons. In said bill of lading defendant Dulien was both the consignor and the consignee and it was not an order bill of lading. Said bill of lading, on or before July 25, 1946, was delivered to defendant Dulien.

2. On July 27, 1946, the day on which plaintiff executed his application for a commercial letter of credit (Exhibit B to the Complaint herein) and defendant bank accepted said application, as alleged in Paragraph VII of the First Cause of Action of said Complaint, incorporated in plaintiff's Second Cause of Action by Paragraph I thereof, a condition in the contract between plaintiff and defendant bank created by said application for commercial letter of credit, and said bank's acceptance thereof, to wit: that the drafts should be accompanied by a full set of clean ocean bills of lading made out to order endorsed in blank, freight prepaid, evidencing shipment of 2,000 tons of barbed wire, was impossible of performance, and at all times thereafter remained impossible of performance. A condition in said letter of credit (Exhibit C to the Complaint) to wit: that the drafts must be accompanied by a full set clean on board ocean bills of lading made out to order, blank endorsed, marked freight prepaid, evidencing shipment of 2,000 tons of barbed wire, was impossible of performance, and at all times thereafter remained impossible of performance. Each of said conditions was and is void and of no force or effect; but said contract between plaintiff and defendant bank, excepting only as to said void condition, remained in full force and effect.

Wherefore, defendant prays judgment as in its

answer [217] and in its cross-complaint herein set forth.

COSGROVE, CRAMER,
DIETHER & RINDGE,

By /s/ JOHN N. CRAMER,
Attorneys for Defendant Citizens National Trust &
Savings Bank of Los Angeles.

[Endorsed]: Filed April 18, 1950. [218]

[Title of District Court and Cause.]

MOTION TO DISMISS AND
FOR NON-SUIT

Come Now the defendant Dulien Steel Products, Inc., of California, a corporation, and the defendant Dulien Steel Products, Inc., a corporation, by their attorney, Joseph H. Dasteel, Esq., and move the court that the plaintiff's complaint herein be dismissed, and that a judgment of non-suit be granted, upon the following grounds, to wit:

1. That the evidence introduced by plaintiff is insufficient to support the allegations contained in the complaint, for the following reasons and in the following particulars:

A. That the plaintiff's attempt to introduce parol evidence to alter or change the terms of the written contract is inadmissible.

B. That the plaintiff's attempt to show a sale by sample falls because the language in the written

contract is inappropriate to express a warranty of quality by sample or otherwise.

C. That the plaintiff received exactly what he bargained for, both as to quality and quantity.

D. That the plaintiff accepted delivery and took control of the specified goods. [220]

* * *

Dated May 8, 1950.

Respectfully submitted,

/s/ JOSEPH H. DASTEEL,
Attorney for Defendant Dulien Steel Products Co.,
Inc.

[Endorsed]: Filed May 23, 1950. [228]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER PER-
MITTING DEFENDANT DULIEN STEEL
PRODUCTS, INC., OF CALIFORNIA, A
CORPORATION, AND DEFENDANT
DULIEN STEEL PRODUCTS, INC., A COR-
PORATION, TO FILE CROSS-COMPLAINT
AGAINST MATSON NAVIGATION COM-
PANY, A CORPORATION

To: Thomas S. Bunn, Esq., Attorney for Plaintiff.

To: Messrs. Morrow & Trippet, Attorneys for De-
fendant Matson Navigation Company.

You and Each of You Will Please Take Notice
that the defendants Dulien Steel Products, Inc., of
California, a corporation, and Dulien Steel Products,

Inc., a corporation, will move [229] the above-entitled court, in the court room of the Honorable Peirson Hall, District Judge, in the Federal Courts and Post Office Building, Los Angeles, California, on Wednesday, May 24, 1950, at the hour of 10:00 a.m. of said day, or as soon thereafter as counsel can be heard, for an order granting them leave to file a cross-complaint against the defendant Matson Navigation Company, a copy of which proposed cross-complaint and affidavit are annexed hereto.

Said motion will be made upon the ground that evidence has been introduced in the trial regarding negligent acts on the part of the defendant, Matson Navigation Company, that were unknown to defendants Dulien prior to the time of the trial of this action, and therefore this motion is made on the further ground that the defendants Dulien herein may amend their pleadings and file supplemental pleadings in the form of a cross-complaint, as provided by Rules 15(b) and 15(c) of Federal Jurisdiction and Procedure.

* * *

Wherefore, defendants Dulien ask that the court make said order.

Dated May 23, 1950.

/s/ JOSEPH H. DASTEEL,
Attorney for Defendants Dulien Steel Products,
Inc., of California and Dulien Steel Products,
Inc. [230]

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH H. DASTEEL

State of California,

County of Los Angeles—ss.

Joseph H. Dasteel, being first duly sworn, deposes and says: That he is an attorney at law, duly admitted to practice in all of the courts of this state, and resides in the county and state aforesaid; that he is the attorney of record for the defendants, Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., in the above-entitled action. [231]

* * *

That the said acts of the said Matson Navigation Company contributed and were the proximate cause of plaintiff's action against the defendants Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc. as set forth in the third cause of action in plaintiff's complaint on page 13, Paragraph IV, wherein it is alleged that the defendants Dulien and Matson Navigation Company caused said [232] wire to be unloaded onto the dock without segregation as to quality.

* * *

/s/ JOSEPH H. DASTEEL.

Subscribed and sworn to before me this 23rd day of May, 1950.

[Seal] /s/ HELEN E. VAN BRUNT,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires Aug. 17, 1952. [233]

[Title of District Court and Cause.]

CROSS-COMPLAINT OF DULIEN STEEL
PRODUCTS, INC., OF CALIFORNIA AND
DULIEN STEEL PRODUCTS, INC.

Come Now the defendants Dulien Steel Products, Inc., of California, a corporation, and Dulien Steel Products, Inc., a corporation, hereinafter called "Dulien," and for cross-complaint against the defendant Matson Navigation Company, a corporation, and by leave of court first had and obtained, file this, their cross-complaint, and allege:

I.

In the first cause of action in the complaint herein, [234] plaintiff made a claim against defendants, Dulien Steel Products, Inc., of California, a corporation, and Dulien Steel Products, Inc., a corporation, hereinafter referred to jointly and severally as Dulien, and prayed for judgment against said defendant in the sum of \$197,552.66 plus interest. For the particulars thereof reference is made to the First Cause of Action in said complaint contained.

* * *

IV.

That the plaintiff is seeking damages against defendants Dulien for alleged breach of warranty in the sale of certain barbed wire and is also seeking damages against the defendant Matson Navigation

Company for the issuance of an alleged false bill of lading covering said barbed wire.

V.

That the evidence introduced in this case developed the [235] fact that the defendant Matson Navigation Company contracted to ship two lots of barbed wire for the defendants Dulien on the steamship "White Squall" which was loaded in Honolulu and contained the two shipments of barbed wire on two separate bills of lading, one being No. LA-22 and marked "Notify Gonzales and Blanco" and the other being bill of lading No. LA-29, a straight bill of lading marked "consigned by shipper to shipper," that regardless of the fact that there were two bills of lading and separate shipments of barbed wire for each bill of lading, that the said Matson Navigation Company loaded all of the wire aboard ship and mixed same up without any segregation as to the two different bills of lading, making it difficult to segregate the same upon arrival at destination, namely, Long Beach, California. [236]

* * *

Wherefore, defendants and cross-complainants Dulien pray judgment that in the event plaintiff herein shall recover judgment against them and in the event cross-complainants Dulien shall be compelled to pay any amounts to the plaintiff in satisfaction thereof that the defendants and cross-complainants Dulien recover same from the cross-defendant Matson Navigation Company, and that

they may have such other and further relief as to the court may seem just and proper in the premises.

/s/ JOSEPH H. DASTEEL,
Attorney for Defendants and Cross-Complainants
Dulien Steel Products, Inc., of California and
Dulien Steel Products, Inc.

[Endorsed]: Filed May 24, 1950. [237]

[Title of District Court and Cause.]

MOTION TO STRIKE TESTIMONY OF
PLAINTIFF'S WITNESSES

Come Now the defendants, Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., and move the court that all of the parol and other testimony and evidence offered by plaintiff's witnesses referring to or tending to change the terms of the written sales contract, namely, Plaintiff's Exhibits No. 2 and 2a, also referred to as "Defendant Dulien's Sales Order No. LA-712," dated July 12, 1946, be stricken from the record.

Dated: May 24, 1950.

/s/ JOSEPH H. DASTEEL,
Attorney for Defendants Dulien Steel Products,
Inc., of California and Dulien Steel Products,
Inc.

[Endorsed]: Filed May 25, 1950. [238]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

(To Third Cause of Action Against Defendant,
Matson Navigation Company)

Leave of Court having been first had and obtained so to do in the course of trial hereof, plaintiff files as of May 26, 1950, this Amendment to the Complaint, to include the following additional paragraph VI as a part of plaintiff's Third Cause of Action, against defendant, Matson Navigation Company, and alleges:

Third Cause of Action (Matson)

VI.

That for the reasons alleged in paragraphs II and III hereof the representations contained in said bill of lading as [239] to the apparent good order and condition of said barbed wire and as to the quantity thereof were false. That plaintiff is informed and believes and upon that ground alleges that the bank made said \$214,000.00 payment to Dulien without receiving any bill of lading whatever; but that the bank contends that said payment was made upon the delivery to it by Dulien of, and upon the bank's reliance upon, said clean straight bill of lading issued by Matson as above alleged in Paragraph II hereof. Therefore, plaintiff alleges that if the bank did receive such false bill of lading and did pay Dulien in reliance thereon and if this

Court so finds, then by reason of the issuance of such false bill of lading by Matson and the placing of it in circulation in commerce to plaintiff's detriment, and by reason of Matson's failure to deliver to plaintiff barbed wire of the quality and quantity described and set forth in said bill of lading, defendant Matson is further liable to plaintiff jointly and severally with Dulien and the bank for the loss and damage, totaling \$131,552.66, plus interest thereon, claimed by plaintiff in paragraph IV hereof.

Wherefore, plaintiff asks judgment as in the original complaint prayed.

/s/ THOMAS S. BUNN,
Attorney for Plaintiff.

[Endorsed]: Filed May 31, 1950. [240]

[Title of District Court and Cause.]

MOTION TO DISMISS PURSUANT TO
RULE 41(b)

Defendant, Citizens National Trust & Savings Bank of Los Angeles, moves the Court, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for a judgment of dismissal of this action against said defendant bank upon the merits, upon the ground that plaintiff has shown no right to relief.

The defendant assigns in support of said motion the following:

1. The contract between defendant bank and

plaintiff for letter of credit of \$214,000.00 specifically provides that defendant bank shall not be liable for the damages claimed by plaintiff.

2. The contract between defendant bank and plaintiff for said letter of credit clearly shows that the damages claimed by plaintiff were not in contemplation of the parties.

3. Plaintiff's alleged damage has not been shown to have [241] been proximately caused by any act of defendant bank.

4. All of the damages claimed by plaintiff were caused by the intervening acts of third parties and defendant bank is not responsible therefor.

5. Plaintiff accepted the wire and the documents on which defendant bank paid the letter of credit with full knowledge of the condition of the wire and of the character of said documents, and as a result plaintiff is estopped to claim that defendant bank did not comply with the terms of its contract.

6. Plaintiff did not rely on said letter of credit in purchasing wire from Dulien.

7. Defendant bank is not responsible for damages claimed by plaintiff resulting from his own failure to take advantage of the favorable provisions of his contract with Dulien or as modified on August 5, 1946.

8. Damages claimed by plaintiff are not clearly shown to be ascertainable in both nature and origin

9. At the time said letter of credit was purchased

and at all times thereafter it was impossible for defendant bank to have secured clean, order bill of lading for 2,000 tons of wire shipped from Honolulu to Long Beach.

Dated: June 1, 1950.

COSGROVE, CRAMER,
DIETHER & RINDGE,

By /s/ LEONARD A. DIETHER,
Attorneys for Defendant, Citizens National Trust &
Savings Bank of Los Angeles.

[Endorsed]: Filed June 1, 1950. [242]

[Title of District Court and Cause.]

SECOND AMENDMENT TO COMPLAINT

Comes Now the Plaintiff, and leave of Court being first had and obtained, makes the following amendments to the complaint:

In First Cause of Action

In paragraph II(a) on page 2, line 8, after the word California, inserts the following language:

“* * * and that at all times herein mentioned defendant Dulien Steel Products, Inc., was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington and authorized to do [247] busi-

ness and doing business in the State of California.” [Allowed.]*

In paragraph VIII, on page 6, line 2, inserts after the word bank, the word “negligently.” [Allowed.]

In paragraph X, on page 7, line 13, after the word county, inserts the words “for export, for domestic use, or for junk.” [Allowed.]

In paragraph XI, on page 7, line 20, after the word county, inserts the words “for export.” [Allowed.]

In paragraph XII, on page 8, line 15, after the word wire, inserts the words “for export.” [Allowed.]

In paragraph XVI, on page 11, line 15, after the word value, inserts the words “for export.” [Allowed.]

In Second Cause of Action (Bank)

In paragraph IV, on page 13, line 13, after the word county, inserts the words “for export.” [Allowed.]

In paragraph V, on page 14, line 12, after the word plaintiff, insert the words “for export.” [Allowed.]

In paragraph VII, on page 14, inserts between

*[The words allowed and disallowed appearing in brackets in this Second Amendment to Complaint appear in longhand in the margin of the original, initialed H.]

lines 29 and 30, the following new matter: [Allowed.]

“and that plaintiff then had a customer in Colombia, whose name was known to defendant bank, ready, able and willing to pay plaintiff \$160.00 per ton c.i.f. Colombian Port for 1,000 tons of galvanized wire from said shipment”;

In paragraph VII, page 14, line 31, after the word value, at the end of the line, inserts the words “for export.” [Allowed.]

In paragraph X on page 16, lines 4 to 6, revises the language to read as follows:

“and by reason of the delivery to plaintiff of wire other than and different from what plaintiff would have been entitled to under the documents called for by said letter of credit, plaintiff had been damaged.” [Disallowed.]

On page 19 adds new paragraph to said Second Cause of Action (Bank) to be numbered XIII and to read as follows:

XIII.

“That defendant bank contends and will throughout the trial of this cause contend, that the bank did receive from Dulien when said \$214,000.00 payment was made, a clean straight bill of lading. That plaintiff has above alleged in paragraph II hereof, and here reiterates, that defendant bank did not receive any bill of lading whatever. By reason of the fact that until this cause is determined plaintiff cannot know certainly whether or not the bank did receive such clean straight bill of lading, or any bill

of lading, plaintiff further alleges that even if the bank did receive the clean straight bill of lading which it claims it did receive and did pay thereon, nevertheless such receipt thereof and payment thereon by the bank were in violation of plaintiff's instructions as contained in said letter of credit; and that plaintiff's loss on account of such violation of his said instructions was the same as is set forth in detail in paragraph X hereof." [Allowed.]

And likewise on page 19 adds new paragraph to Second Cause of Action (Bank), to be numbered XIV, and to read as follows:

XIV.

"That the consideration for the \$535.00 service charge made by the defendant bank against plaintiff, and included in the amount of the [249] promissory note for \$54,535.00 given by plaintiff to the bank, failed in that plaintiff's instructions to the bank were not carried out and therefore the service for which said charge was made was not performed." [Allowed.]

/s/ THOMAS S. BUNN,
Attorney for Plaintiff.

[Endorsed]: Filed June 14, 1950. [250]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-COMPLAINT OF DEFENDANT AND CROSS-CLAIMANT, CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES

* * *

Points and Authorities

II.

The Judgments as Ordered by the Court Give Plaintiff a Double Recovery to the Extent of the Bank's Counterclaim. This Unjust Enrichment of the Plaintiff Can Be Avoided by Subrogating the Bank to Plaintiff's Judgment Against Dulien.

In addition to assessing damages for lost profits in the principal amount of \$76,000 against Dulien the Court assessed additional items of damage of \$105,699.37 (*supra*, page 3, line 10), or a total of \$181,699.37 (*supra*, page 3, line 15). These additional damages of \$105,699.37 equal the same amount as that assessed against the bank before deducting its counter claim in the principal amount of \$14,609.10 (*supra*, page 3, lines 10, 13, and 15).

Plaintiff's note to the bank which was the basis of the bank's counter claim, will be cancelled by the judgment. The plaintiff will thereby have received from the bank a benefit in the principal amount of \$14,609.10, plus interest. If, in addition, plaintiff collects, either from Dulien, or partly from Dulien

and partly from the bank, the amount of \$181,699.37 (supra, page 3, line 15) He Will Have Had a Double Recovery in the Amount of the Bank's Counterclaim, as the following computation shows:

Paid by Dulien alone, or Dulien and	
the bank, the sum of.....	\$181,699.37
Plus cancellation of the bank's note	
in the principal sum of.....	14,609.10
	<hr/>
Makes a total (excluding interest)	
of	\$196,308.14

Irrespective of whether Dulien pays the entire judgment against it, or whether the bank pays the judgment against it and Dulien pays the balance, the fact still remains that the plaintiff will not only have the benefit of having his note paid, but will have a judgment equivalent to the amount of said note against Dulien.

We assume that the Court has no intention of permitting plaintiff to make a double recovery of any part of the amount found to be owing to him. Yet such is the result of the judgments ordered by the Court on Friday evening, June 16, 1950. How can this unjust enrichment of the plaintiff be prevented? There are two possible ways:

(a) Defendant and cross-defendant Dulien will probably claim that the judgment against it should be reduced by the amount of the bank's counterclaim. The answer to this is simple. There was no counterclaim in favor of Dulien against London and if there had been, none was pleaded. The Court

has held that the acts of Dulien have caused principal damages to plaintiff, amounting to \$181,699.37. Why should these be diminished because of the mere fact that Londono owed the bank some money on a note? If Londono had paid the note, there would be no question but that under the decision of the Court Dulien would be liable to Londono in the principal sum of \$181,699.37. Why should the mere fact that Londono failed to pay his note to the bank inure to the benefit of Dulien? Moreover, should the Court grant a new trial as to the bank, or should the judgment against the bank be reversed on appeal, and on such new trial, or as a result of such appeal it is determined that the bank is not liable to Londono, the bank would then be entitled to a judgment against Londono for the amount of its counterclaim. If the Court, in order to prevent a double recovery by the plaintiff, should have reduced the judgment against Dulien by the amount of the bank's counterclaim, then if the judgment against Dulien became final, the present situation would be reversed and the plaintiff would have to pay the bank the amount of its counterclaim and still have the judgment in his favor against Dulien reduced by that amount.

There is another method by which plaintiff will not be unjustly enriched and defendant Dulien will not be allowed a windfall, and this method we urge, namely:

(b) That the Court declare that in the event the judgment against the bank become final,

(1) Out of moneys collected by plaintiff from defendant Dulien plaintiff shall hold an

amount equivalent to the bank's counterclaim (\$14,609.10 plus interest) in trust for the bank;

(2) Or if the plaintiff shall not have collected such moneys from Dulien the bank shall be immediately subrogated to the plaintiff's rights against Dulien in an amount equivalent to said counterclaim.

Under this plan (b) the judgments ordered by the Court would not be changed by reason of the matters herein discussed. Plaintiff would not be unjustly enriched because he would hold the money in an amount equivalent to the bank's counterclaim in trust for the bank.

The situation discussed under this Point II is a condition which confronts the Court and the parties at the present time. It is not hypothetical. The reasons which support our said contention are the same as those which apply to the residue of the judgment for which authorities will be cited in the next succeeding point of this brief (Point III).

* * *

/s/ ALFRED T. MARSHALL.

[Endorsed]: Filed July 5, 1950.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The defendants, Dulien Steel Products, Inc., of California, a corporation, and Dulien Steel Products, Inc., a corporation, hereby substitute Joseph

H. Dasteel, Esq., and Henry S. Dottenheim, Esq., of 9538 Brighton Way, Beverly Hills, California, as their attorneys in the place and stead of Joseph H. Dasteel, Esq.

Dated June 28, 1950.

DULIEN STEEL PRODUCTS, INC., OF CALIFORNIA, a Corporation.

DULIEN STEEL PRODUCTS, INC., a Corporation.

By /s/ LOUIS KLATZKER,
Assistant Secretary.

We hereby consent to the substitution as set forth above.

/s/ JOSEPH H. DASTEEL,

/s/ HENRY S. DOTTEHHEIM.

Dated June 28, 1950.

[Endorsed]: Filed July 11, 1950. [251]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause coming on regularly for trial the 18th day of April, 1950, before the above-entitled Court, the Honorable Peirson M. Hall, Judge, presiding, in consolidation for trial with Suit in Admiralty No. 8482-PH entitled J. B. Londono, Libelant vs. United States of America, United States Maritime

Commission and War Shipping Administration, Respondents, before the Court without a jury, a jury having been specifically waived by all parties hereto; Thomas S. Bunn, appearing as counsel for Plaintiff and Cross-Defendant, J. B. Londono and for Libelant J. B. Londono; Joseph H. Dasteel, appearing as counsel for Defendants, Cross-Complainants and Cross-Defendants Dulien Steel Product, Inc., of California and Dulien Steel Products, Inc., hereinafter collectively [252] referred to as Dulien, Cosgrove, Cramer, Diether & Rindge, by Leonard A. Diether and Jesse R. O'Malley, appearing as counsel for defendant and cross-complainant Citizens National Trust & Savings Bank of Los Angeles, hereinafter referred to as the Bank; Brobeck, Phleger & Harrison, by Alan W. Aldwell, and Morrow & Trippet, by Hubert T. Morrow, John C. Morrow and Thomas F. Hetherington, appearing as counsel for Defendant and Cross-Complainant Matson Navigation Company, hereinafter referred to as Matson; and Ernest A. Tolin, United States Attorney, by Bernard B. Laven, Assistant United States Attorney, appearing as counsel for Respondents, United States of America, United States Maritime Commission and War Shipping Administration, in consolidated Suit in Admiralty No. 8482-PH; Answers having been filed by all defendants and respondents; Cross-Complaints having been filed by the Bank against plaintiff, Dulien and Matson and by Matson against Dulien, all of said cross-complaints being by stipulation deemed denied by the respective cross-defendants; the Bank's original

Answer having been prior to trial by permission of the Court amended by its First and Second Amendments, and the plaintiff during the course of the trial being permitted to amend his Complaint by his First and Second Amendments thereto, filed herein on May 31, 1950, and June 14, 1950, respectively, and all references herein to the said Complaint and said Answer of the Bank being to said Complaint and said Answer as amended; the trial having continued from day to day to and including June 16, 1950, and oral and documentary evidence having been introduced on behalf of all parties hereto; and the Court having announced its decision from the bench on June 16, 1950, and having directed the preparation of Findings of Fact, Conclusions of Law and Judgment herein; and plaintiff having thereafter on the 21st day of July, 1950, originally submitted proposed Findings of Fact, Conclusions of Law and Judgment, to which written objections were filed by the several defendants, [253] and a three day hearing, upon due notice to all parties, having been held by the Court upon said objections on September 28th, 29th and 30th, 1950, at which hearing all parties were represented; and the plaintiff having thereafter re-submitted Findings of Fact, Conclusions of Law and Judgment, in accordance with direction of the Court at the conclusion of said hearing to which objections were filed and on which objections another duly noticed hearing was held by the Court on November 2nd, 1950, at which hearing all parties were represented; and the Court being fully advised

in the premises, the Court now makes its Findings of Fact as follows, to wit:

Findings of Fact

I.

That at the time of the filing of the complaint and at all times mentioned therein, plaintiff was a citizen of and resided in the Republic of Colombia, South America, and had no place of business in the United States of America. [254]

II.

(a) That at all times in the complaint mentioned defendant Dulien Steel Products, Inc., of California, was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and appeared and filed its Answer herein on Aug. 27, 1947, and defendant Dulien Steel Products, Inc., was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and doing business in the State of California, and appeared and filed its Answer herein on Aug. 27, 1947, and both said Dulien corporations were at all times during the trial represented by Joseph H. Dasteel. That at all times in the complaint mentioned the names of defendants Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., were used interchangeably by said defendants in the Dulien transactions set forth in the complaint, and they are hereinafter referred to in the singular, as Dulien, unless otherwise herein indicated.

(b) That at all times in the complaint mentioned the defendant Citizens National Trust and Savings Bank of Los Angeles, hereinafter referred to as the Bank, was and now is a National Banking Association, organized and existing under the laws of the United States of America and located and having its principal place of business within the jurisdiction of this Court, to wit, in the City of Los Angeles, County of Los Angeles, State of California, and during all of said times was and now is engaged in the general banking business in Los Angeles, California.

(c) That at all times in the complaint mentioned the defendant Matson Navigation Company, hereinafter referred to as Matson, was and now is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City of San Francisco, California, but maintaining also a place of business in the City of Los Angeles.

(d) That at all times during the months of June, July, [255] August and September, 1946, and at all times material to the above-entitled action the S.S. White Squall was a merchant vessel and was owned and operated by the United States of America acting by and through the Administrator, War Shipping Administration, and by his or its successor, the United States Maritime Commission, and at all such times said vessel was assigned by said War Shipping Administration and said United States Maritime Commission to Lykes Bros. Steam-

ship Company as general agent, pursuant to the terms and conditions of the standard War Shipping Administration form of general agency agreement commonly known as G.A.A. 4-4-42 and published in the Federal Register and in Title 46 C.F.R. Cumulative Supplement, page 11427; that said vessel was assigned by the United States of America, acting through said Administrator and said Maritime Commission, to defendant Matson Navigation Company as berth agent under and pursuant to the terms and conditions of the berth agency agreement dated January 1, 1944, a photostatic copy of which was admitted in evidence as "Exhibit 61," for the voyage from Honolulu to Los Angeles-Long Beach which is involved in this action; and at all such times and in all its conduct hereinafter mentioned Matson was acting under and pursuant to said berth agency agreement and solely as berth agent for the United States of America acting by and through the Administrator, War Shipping Administration. Such agency was disclosed and shown on the face and back of bill of lading LA 29 and was also disclosed by the form of said berth agency agreement which was published in the Federal Register. That said berth agency agreement was in full force and effect at all times during the years 1946 and 1947 and at all times material to this action. Matson was not at any such time the owner of or the operating agent for said vessel.

III.

That on July 11, 1946, at Los Angeles, Dulien,

by E. S. Grinstein, its office manager, orally offered to sell to plaintiff [256] at the price of \$107.00 per ton, f.o.b. steamer Los Angeles, approximately 2700 net tons of unused government surplus barbed wire, sometimes hereinafter referred to as wire, consisting of 1350 tons of galvanized wire and 1350 tons of black wire. That Dulien then, by the said E. S. Grinstein, orally represented to plaintiff that said wire was owned by Dulien and was then in transit from Honolulu, Hawaii, on board the steamship "White Squall" and was due to arrive in the harbor at Los Angeles, on or about July 22, 1946, and then and there exhibited to plaintiff a number of sample rolls of unused good and merchantable black and unused good and merchantable galvanized barbed wire, free from rust, and on the following day, July 12, 1946, exhibited and gave to plaintiff a number of sample cuttings of unused good and merchantable black barbed wire, likewise free from rust, and, for the purpose of inducing plaintiff to make such purchase, expressly warranted on July 11, 1946, by the said E. S. Grinstein and on July 12, 1946, by Louis Dulien, the President of both said Dulien corporations, that the wire so offered and to be sold to plaintiff had been recently seen in Hawaii by Louis Dulien and was like said samples and would be in all respects equal in quality and condition to said exhibited rolls and sample cuttings, Dulien then knowing that said wire was rusty and non-merchantable and that Dulien could not comply with said warranty.

IV.

That plaintiff after examining said samples of wire and in reliance upon Dulien's said representations and express warranty, accepted said offer on July 12, 1946, and agreed to purchase from Dulien said 700 tons of wire at the rate of \$107.00 per ton, totaling the sum of \$288,900.00 payable upon drafts by Dulien against credits to be established with the bank on or before July 22, 1946. That on account of delay of the "White Squall" in arriving in Long Beach Harbor, as hereinafter stated, said deadline of July 22, 1946, for establishing said credit [257] was thereafter by defendants Dulien orally extended to include July 27, 1946.

V.

That a written sale order on a form supplied by Dulien was prepared by Dulien on July 12, 1946, dated July 12, 1946, numbered LA-712, signed by Dulien as "Dulien Steel Products, Inc., by E. S. Grinstein" and was signed by plaintiff, which sale order was admitted in evidence upon the trial of this cause as "Exhibit 2," but said sale order did not constitute the entire contract between plaintiff and Dulien as will hereinafter more fully appear.

That thereafter on July 26, 1946, Dulien informed plaintiff that the shipment of wire would be only 2300 tons of which Dulien would retain for itself 300 tons, and plaintiff orally agreed to said change in quantity; and thereupon and in that manner the quantity of plaintiff's agreed purchase was reduced to 2,000 tons of good wire. That, while the original

sale order (Exhibit 2) had provided that plaintiff from the 2700 tons mentioned therein might reject not more than 300 net tons due to "excessive weathering," by this change in amount it was agreed that Dulien would sell and deliver and plaintiff would buy 2,000 tons of good, non-rusty, merchantable wire, 1,000 tons of which would be galvanized and 1,000 tons black.

That the language of said sale order (Exhibit 2) was ambiguous on its face; the contract between plaintiff and Dulien consisted not only of said sale order dated July 12, 1946, but of the previous oral conversations between plaintiff and Dulien, the showing of the sample rolls and the giving of the sample cuttings of wire to plaintiff and the oral representations by Dulien in regard thereto, the subsequent conversations and documents reducing the quantity of the purchase to 2,000 tons and agreeing to renegotiate the price and to permit plaintiff a [258] delay of a few days in establishing credit, and the terms of the hereinafter mentioned letter of credit (Exhibit 5) which Dulien received and accepted and acted upon and upon which Dulien was paid by the bank; and that said contract in substance was that Dulien would sell and deliver to plaintiff and plaintiff would buy and receive from Dulien, for the total of \$214,000.00, payable upon draft by Dulien against letter of credit to be established by plaintiff with said bank on or before July 27, 1946, at the price of \$107.00 per ton f.o.b. steamer Los Angeles, 2,000 tons of good, non-rusty, merchantable barbed wire, 1,000 tons of which would be black and 1,000

tons galvanized, equal in quality and condition to the sample rolls shown and the sample cuttings given to plaintiff as herein stated, for export to and sale in South America by plaintiff, and that the title to said wire would be transferred by a full set of clean, on board, ocean bills of lading made out to order, blank endorsed, marked freight prepaid. That Dulien represented to plaintiff on July 11th and 12th, 1946, that such wire was then on board the steamship and was in transit on the high seas from Hawaii. And the Court finds that plaintiff believed and relied upon and acted upon all said representations so made by Dulien; and therefore the Court further finds that the intention of the parties to said contract was that Dulien would sell and plaintiff would buy said quantity and kinds of good barbed wire, that is to say, not rusty wire, which would be merchantable and could be used for the purpose for which Dulien then knew plaintiff intended it, that is, for export to and sale in South America.

VI.

That on or about July 19, 1946, Matson, acting as above-stated in its capacity as berth agent for the United States of America and War Shipping Administration, by its own agent Castle & Cook, Ltd., in Honolulu, T. H., at the request of Dulien issued to Dulien bill of lading LA 29 and delivered the same to Dulien [259] on or about July 20, 1946. That said bill of lading LA 29 was dated July 12, 1946, and was admitted in evidence at the trial as "Exhibit C-N." That said bill of lading had been

prepared by Dulien for signature and issuance by Matson and was for approximately [260] 2300 tons of wire expressed in pounds. That it was not an "order" bill of lading as defined in 49 USCA Sec. 83 (one in which it is stated that the goods are consigned to the order of any person named in such bill), nor was it an "on board" bill of lading, nor was it negotiable; but it was a non-negotiable, straight, clean bill of lading; that is, it was a straight bill as defined in 49 USCA Sec. 82, in that it was therein stated that the goods were consigned to a specified person, to wit Dulien, Dulien being both the shipper and the consignee, and it was a clean bill in that it stated that said wire had been received by Matson, for the master of said vessel, from the shipper (Dulien) in apparent good order except as therein otherwise noted and there were no exceptions therein noted.

VII.

That when said bill of lading LA 29 was so issued by Matson such a quantity of said wire upon which it was issued was obviously badly rusted that the Court finds that at that time substantially the whole shipment of said 2300 tons was badly rusted, and that its rusty condition was apparent and was known to Matson's said agent, Castle & Cook, Ltd., and to Matson at the time of the issuance and delivery of said bill of lading. That therefore said wire on which said bill of lading LA 29 was issued was not in such condition as to warrant the issuance of a clean bill of lading

thereon, but was in such condition as to require, under the provisions of Section 22 of Chapter 415 of the Act of August 29, 1916 (The Pomerene Act), Title 49 USCA Sec. 102, the notation on the bill of lading of exceptions to the "apparent good order" representations therein contained, indicating its rusty condition. That the rusting of said wire occurred prior to the delivery of said wire to the dock in Honolulu by Dulien and to the loading of the wire aboard the S. S. White Squall. That at all times mentioned in the complaint and at all pertinent times and in particular at the [261] time said wire was delivered by Dulien in Honolulu for shipment on the S.S. White Squall and at the time of the issuance and delivery of said bill of lading LA 29 the aforesaid badly rusted condition of said wire was well and truly known to Dulien.

That in the month of July, 1946, on a date prior to July 12, 1946, Matson issued to Dulien bill of lading LA 22 (Exhibit U-S-M) on another shipment of 1500 tons of barbed wire, described in said bill of lading as "29,126 rolls barbed wire 103# to the roll weight 3,000,000." That said bill of lading LA 22 (Exhibit U-S-M) was a clean, order bill of lading and showed the shipper as "Dulien Steel Products of California., c/o Lacy Hofius, Moana Hotel, Honolulu," and showed the consignee as "Order of Dulien Steel Products, of Calif. Notify: Gonzalez & Blanco, Los Angeles, Calif." That said bill of lading LA 22 was received by Dulien at its Los Angeles office on July 12, 1946, and, duly endorsed by Dulien, was de-

livered and negotiated to Gonzalez & Blanco's agent, the California Bank, in Los Angeles prior to July 19, 1946.

That on July 19, 1946, the S.S. White Squall with a shipment of approximately 3800 tons of barbed wire aboard sailed from Honolulu for Los Angeles, California. That making up said shipment of approximately 3800 tons of barbed wire were approximately 2300 tons (See Finding of Fact XXX) for which said bill of lading LA 29 (Exhibit C-N) was issued and 1500 tons for which said bill of lading LA 22 (Exhibit U-S-M) was issued.

VIII.

That on or about July 24, 1946, Dulien received at its Los Angeles office from its shipping agent in Honolulu the original bill of lading LA 29 and a copy thereof; and after the receipt thereof Dulien, by a letter dated July 25, 1946 (Exhibit 3), signed by Dulien, by L. P. Stanley, informed plaintiff that Dulien then had the "on board" bill of lading and required of plaintiff that the credit for the purchase price of the wire be established, as agreed, at the bank not later than 3:00 p.m., July 26, 1946; that at the time of writing said letter Dulien knew that [262] the only bill of lading which it could deliver to plaintiff was the above-mentioned non-negotiable straight bill of lading showing Dulien as both consignor and consignee and knew that Dulien could not comply with the representations and warranties theretofore made to plaintiff as

hereinbefore set forth, but did not inform plaintiff of those facts.

IX.

That the steamship "White Squall" was delayed and docked on July 26, 1946, at Pier A at Long Beach Harbor instead of at Los Angeles Harbor and on said day, July 26, 1946, Dulien orally to plaintiff extended to Saturday, July 27, 1946, the deadline for the establishment by plaintiff of the agreed credit at the bank.

X.

That on July 27, 1946, at its Wilmington, California, office, Matson prepared and on July 29, 1946, issued and delivered to Dulien the freight bill which was admitted in evidence as "Exhibit 7," upon a printed form containing in typewriting the same language descriptive of said wire and the same format as was and is found in bill of lading LA 29, and containing no notations of exceptions indicating the rusty condition of said wire. That on July 29, 1946, the bank was then familiar with Matson's printed form on which bill of lading LA 29 was prepared. That it was then Matson's custom and practice to cause each freight bill issued by it to contain all the descriptive information about the shipment covered thereby as was contained in the bill of lading issued upon the same shipment. But Matson was under no legal obligation to insert any exceptions in said freight bill. That on July 29, 1946, the bank was not familiar with and had no knowledge of said custom or practice of Matson

in connection with its freight bills and the bank was not then familiar with the form of freight bill issued by Matson. [263]

XI.

That on Saturday morning, July 27, 1946, before any of said wire had been unloaded and before plaintiff had had an opportunity to see or had seen any of the wire plaintiff, for \$214,000.00 purchased from defendant bank upon his written application therefor (Exhibit 4) and received from the bank and personally by hand delivered to Dulien on July 27, 1946, the bank's irrevocable letter of credit (Exhibit 5) by its terms good until July 31, 1946, in favor of "Dulien Steel Products, Inc.," for \$214,000.00 to cover the purchase price of 2000 tons of wire at \$107.00 per ton. That the \$214,000.00 purchase price of said letter of credit was paid by plaintiff in two installments: \$160,000.00 on July 27, 1946, and the balance of \$54,000.00 on the following Wednesday, July 31, 1946, as is hereinafter stated.

XII.

That by the terms of said letter of credit and the written application therefor defendant bank was instructed by plaintiff, and it contracted and bound itself, to pay to "Dulien Steel Products, Inc.," for account of plaintiff \$214,000.00 on said Dulien's sight drafts accompanied by "Full set clean on board ocean bills of lading made out to order, blank endorsed, marked freight prepaid" and by "commercial invoices evidencing shipment of 2,000 tons barbed wire c.i.f. Los Angeles Harbor

in one shipment from Honolulu, T. H. to Los Angeles Harbor.” That in the shipping business “c.i.f.” means “cost, insurance and freight” and the use of such term indicates that the merchandise will be delivered at the destination or port of discharge free of any charges for any of said items. That on the same day, July 27, 1946, plaintiff orally instructed the bank that upon the bank’s receipt of said documents specified in and required by said letter of credit the bank should authorize Mattoon & Company, Inc., an independent shipping agent and ocean freight forwarder having a Los Angeles [264] office, to ship said wire to South America subject to directions to be thereafter given to Mattoon & Company, Inc., by plaintiff.

XIII.

That after obtaining said letter of credit from the bank on July 27, 1946, plaintiff later on the same day, Saturday, personally delivered said letter of credit to Dulien by delivering the same to E. S. Grinstein at Dulien’s Los Angeles office at 11601 South Alameda Street. That Dulien then and there received and accepted and proceeded to and did as soon as possible thereafter act upon said letter of credit, with full knowledge of the fact that it, Dulien, could not comply with the requirements thereof or deliver to plaintiff 1,000 tons of black non-rusty merchantable wire and 1,000 tons of galvanized non-rusty merchantable wire in accordance with Dulien’s contract with plaintiff as herein elsewhere set forth. That on Monday, July 29, 1946,

Dulien, well knowing that said bill of lading was not an on-board bill of lading, or an order bill of lading, and knowing that it was not negotiable and that it bore no endorsement by Dulien, the consignee named therein, but knowing that on the contrary it was a non-negotiable straight bill showing Dulien as both consignor and consignee and that therefore it was not such a bill of lading as would meet the requirements of said letter of credit, paid at Matson's Wilmington, California, office the freight due Matson on said shipment and surrendered the original bill of lading LA 29 to Matson and left it at Matson's Wilmington office and then and there obtained from Matson at its Wilmington office the receipted original freight bill which was admitted in evidence as "Exhibit 7" and forthwith thereafter, in the morning on the same day presented to the bank said letter of credit (Exhibit 5), a draft for \$214,000.00 (Exhibit 17) drawn by "Dulien Steel Products, Inc., of California, L. P. Stanley," said freight bill (Exhibit 7) and one commercial invoice (Exhibit 6) and demanded payment of its said draft. That [265] Dulien did not present or exhibit to the bank at that time or at any other time and the bank did not then or at any other time receive or see or rely upon said bill of lading LA 29 or any bill of lading whatever or any copy of any bill of lading for said wire; but, upon Dulien's presentation to the bank of said freight bill and the other documents last above mentioned, the bank carelessly and negligently and in violation of its ex-

press contract with plaintiff accepted said freight bill in place and instead of requiring the delivery to it of a full set of clean, on board, order, blank endorsed, marked freight prepaid bills of lading, or any bill of lading, and delivered to Dulien, in payment of said draft, and Dulien received and accepted from the bank and cashed immediately, the bank's Cashier's check (Exhibit 18) for \$214,000.00 payable to "Dulien Steel Products, Inc., of California," in complete negotiation of said letter of credit. Dulien at no time transferred to plaintiff or delivered to plaintiff or to the bank or any agent or representative of plaintiff or of the bank said bill of lading LA 29, nor any bill of lading or copy of any bill of lading nor did Dulien at any time prior to the presentation and acceptance of payment of said letter of credit (Exhibit 5) transfer to plaintiff any rights under said bill of lading.

XIII-a.

That said payment to Dulien was made by the bank at about 10:00 o'clock on Monday morning, July 29, 1946, before plaintiff had seen, or had had an opportunity to see, any of said wire and was made in disregard and violation of the terms of the contract between plaintiff and the bank and specifically said letter of credit and the instructions given by plaintiff in his application therefor, in that it was made without receiving from defendant Dulien the required bill of lading or any bill of lading whatever. [266]

XIV.

That on the same day, July 29, 1946, after having made such payment to Dulien the bank sent to Mattoon & Company, by messenger, the original freight bill (Exhibit 7) with a letter of transmittal. That on the following day, July 30, 1946, by telephone the bank requested Mattoon & Company to return to the bank said letter of transmittal, together with the document which had been delivered with it to Mattoon & Company. That on July 31, 1946, Mattoon & Company, by its Los Angeles office manager, James E. Sweeney, personally returned said freight bill and original letter of transmittal to the bank in the presence of plaintiff, and the bank thereupon reported to plaintiff in writing in a letter dated July 29th but actually then and there for the first time delivered to plaintiff on July 31st (Exhibit C-F) that it had made payment to Dulien of \$214,000.00 upon Dulien's draft drawn under said letter of credit and accompanied by the documents called for therein, including the required bill of lading; and thereupon the bank caused to be dictated a new letter to Mattoon & Company (Exhibit C-D) which was thereafter written and later transmitted to Mattoon & Company, to which letter the date of July 29, 1946, was given, although it was not actually typed and signed until on or after July 31, 1946. That the said last mentioned letter, by its language, purported to transmit to Mattoon & Company an original bill of lading on 2300 tons of barbed wire, but no bill of lading accompanied it nor did the bank then or at any time thereafter

or at any time before then or ever have or obtain or transmit to anybody any bill of lading for said barbed wire. That upon the return by Mattoon to the bank on July 31, 1946, of the first July 29, 1946, letter of transmittal from the bank to Mattoon, the bank destroyed said letter and all copies which had been made thereof and before the commencement of the trial of this cause the shorthand notes thereof had likewise been destroyed by the [267] bank. That upon the receipt by Mattoon & Company of said second transmittal letter (Exhibit C-D) dated July 29, 1946, but written on or after July 31, 1946, Mattoon & Company, laboring under the mistaken belief that the bank had in its possession the bill of lading for said wire, and considering itself as the bank's agent insofar as any handling of any bill of lading on said wire was concerned, acknowledged on a copy of the letter (C-D 1) receipt of the bill of lading mentioned therein; but Mattoon & Co. did not at that time nor at any other time receive, nor had it prior thereto received, nor did it ever thereafter receive, the bill of lading mentioned therein or any bill of lading whatsoever. That in executing said receipt on "Exhibit C-D 1" Mattoon & Company was not acting as plaintiff's agent, but was acting as the bank's agent in an effort to protect the bank's interest in said wire under the bank's hereinafter mentioned lien thereon.

XV.

That after the return, on July 31, 1946, of the paid freight bill (Exhibit 7) by Sweeney of Mat-

toon & Company to the bank the bank handed said paid freight bill back to Sweeney, or to the plaintiff in Sweeney's presence, and requested of the plaintiff that an endorsement of said freight bill be obtained from Dulien, but said bank referred to said freight bill at said time as a bill of lading, and thereafter on the same date, pursuant to said request by the bank, plaintiff, accompanied by Sweeney, took said freight bill to Dulien's Los Angeles office at 11601 Alameda Street and in the presence of Sweeney and plaintiff in Dulien's office, Dulien, by L. P. Stanley, well knowing that said freight bill was not the bill of lading for said wire or any bill of lading and that Dulien could not then deliver or transfer to plaintiff the bill of lading or any bill of lading for said wire, typed and signed the endorsement which now appears on the reverse side of said freight bill. That said freight bill was not a bill of lading [268] and was not a document of title at all, and any reference to it as such is not and was not true and no endorsement of said bill of lading LA 29 (Exhibit C-N) or any copy thereof was ever made by anyone at any time.

XVI.

That after the plaintiff had signed the note in the sum of \$54,535.00 payable to the bank (see Finding XXXII) and after said endorsement on the back of the freight bill was received from Dulien, and later on the same day, July 31, 1946, plaintiff for the first time learned it to be true that the wire for which plaintiff's money had been paid

by the bank to Dulien, two days before on July 29th, was badly rusted, as heretofore found (Finding No. VII) and was unmerchantable wire for the purposes for which it was sold to and purchased by plaintiff; that plaintiff first learned such to be the fact when late in the afternoon on Wednesday, July 31, 1946, on the Moore-McCormack dock at Terminal Island plaintiff saw for the first time a small quantity of wire identified as for him, which had been moved from the dock at Pier 1 A, Long Beach under his previous instructions for the shipment of wire to South America. That immediately upon such discovery by him he instructed Mattoon & Company not to ship any of such wire to South America and on the following day, August 1, 1946, he wrote Dulien a letter (Exhibit 23) informing Dulien of the failure of the wire to meet the requirements of the agreement between them and asking for a renegotiation of the price. That thereafter on August 5, 1946, Dulien, by its manager, E. S. Grinstein, in company with plaintiff inspected the portion of said total shipment of 3800 tons of wire then unloaded from the S. S. White Squall which was on the dock at Pier 1 A, Long Beach, for ultimate delivery to plaintiff and observed and admitted its rusty condition and subsequently thereto, on August 7, 1946, wrote plaintiff a letter (Exhibit 25). That by plaintiff's said letter of August 1, 1946 (Exhibit 23), and Dulien's said [269] letter of August 7, 1946 (Exhibit 25), and the conversations ensuing between plaintiff and defendants Dulien between said dates, defendants Dulien on

account of the rusty condition of the said wire on the dock at Pier 1 A, Long Beach, intended for delivery to plaintiff agreed with plaintiff to renegotiate the price which the plaintiff had theretofore paid to defendants Dulien for said wire. That Dulien, by its subsequent conduct in regard to [270] such request, failed and refused to enter into any such negotiations with plaintiff or to make any acceptable or proper or any adjustment on account of the bad condition of the wire with relation to price or otherwise, and said to plaintiff: "The wire is yours and the money is ours." That plaintiff did not on August 1, 1946, or at any time prior to September 4, 1946, know that the bank had not obtained the required or any bill of lading from Dulien, which fact plaintiff learned for the first time on September 4, 1946, and at all times prior to September 4, 1946, in reliance upon the bank's representations to him believed the fact to be that said bank had obtained from Dulien a full set of clean, on board, ocean, bills of lading, made out to order, blank endorsed for 2,000 tons of clean, non-rusty merchantable wire prior to the bank's payment to Dulien of plaintiff's \$214,000.00 on July 29, 1946.

XVII.

That Dulien delivered 41,076 rolls of barbed wire to Castle & Cooke Terminals, Ltd., (hereinafter referred to as Terminals) at the dock operated by Terminals at Honolulu, T. H. Said delivery was commenced on June 28, 1946, and was completed on or before July 19, 1946. At all such times Ter-

minals was acting as terminal operator for respondent War Shipping Administration under and pursuant to its contract with said War Shipping Administration, No. WSA-4-946 (Exhibit M-B-5) and Terminals was at no time acting as Matson's agent. That Dulien delivered 43,478 rolls of barbed wire to Inter-Island Steam Navigation Company, Ltd., agent for said Lykes Bros. S.S. Company, general agent for said S.S. White Squall and said War Shipping Administration between June 3, 1946, and July 9, 1946, during which period said 43,478 rolls of wire were stored in an open area at the pier in Honolulu. All of the said barbed wire (84,554 rolls) was delivered by Dulien, as aforesaid, without any marks or other means of identification thereon and without any segregation as to quality or condition or as to which portion was for delivery to Gonzalez & Blanco under [271] negotiable order bill of lading LA 22 or which portion was for delivery to Dulien under non-negotiable straight bill of lading LA 29. Dulien at no time made any request to Terminals or to defendant Matson or its agents or representatives, or to the carrier, or any agent or representative of the carrier, that any of said rolls of barbed wire be marked or otherwise identified or segregated. That at no time did Matson or Terminals or Marine Terminals put any marks of identification on said wire and did not in any manner at any time segregate the wire which was covered under said bill of lading LA 29 from that which was covered by or under said bill of lading LA 22. All of said

rolls of wire were loaded on said S.S. White Squall at Honolulu, T. H., by Terminals, acting as stevedoring contractor for the War Shipping Administration under and pursuant to its contract with said War Shipping Administration, Warship-steve No. WSA 4-3079 (Exhibit M-B-6).

55,428 of said 84,554 rolls of barbed wire were consigned by Dulien as shipper to Dulien as consignee on straight bill of lading LA 29 (Exhibit C-N) and were described by Dulien in said bill of lading as "Rolls Barbed Wire" weighing approximately 4,599,948 pounds or approximately 2300 tons (shipper's measurement and weight), 29,126 of said 84,554 rolls of barbed wire were consigned by Dulien as shipper to the order of Dulien, notify Gonzalez & Blanco, as consignee under negotiable order bill of lading LA 22 issued by Matson, bearing no date other than July . . ., 1946 (Exhibit US-M), and were described by Dulien in said bill of lading as "Rolls Barbed Wire, 103# to the Roll" and the weight of said rolls was therein stated to be approximately 3,000,000 pounds or approximately 1500 tons. That neither Dulien nor Matson nor the carrier weighed said wire or any of it covered by said bills of lading LA 22 and LA 29 at the time of loading on the S.S. White Squall and the tonnage stated in bills of lading LA 22 and LA 29 was based upon estimates as hereinafter in paragraph XXX set forth. Said two shipments, totaling approximately 3800 tons were not [272] separated or segregated in said ship, S.S. White Squall, either as to quality or as to which portion was for delivery

under negotiable order bill of lading LA 22 or which under non-negotiable straight bill of lading LA 29; and no request for any such separation or segregation was made by Dulien to anyone. Prior to the execution of Exhibit 2 by the plaintiff and Dulien on July 12, 1946, and prior to the issuance and delivery to Dulien of either of said bills of lading Dulien had agreed with Gonzalez & Blanco that Gonzalez & Blanco would have the right to select 1500 tons of good wire from said total shipment of 3800 tons, upon arrival in Los Angeles.

All of said rolls of barbed wire were transported from Honolulu, T. H., to Long Beach, California, by S.S. White Squall. Said ship sailed from Honolulu, T. H., on July 19, 1946, and arrived at Long Beach, California, on July 26, 1946. All of said rolls of barbed wire were unloaded from said ship at Pier 1 A, Long Beach, California, commencing on July 28, 1946, and ending on August 7, 1946, by Marine Terminals Corporation, acting as stevedoring contractor for the War Shipping Administration under and pursuant to its contract with said War Shipping Administration, Warshipsteve No. WSA 4-1470, DA-WSA-4-403 (Exhibit M-B-8). When said rolls of wire were unloaded, as afore-said, it was found by the stevedores that because said rolls of barbed wire had not been marked or otherwise identified or segregated when loaded on said ship it was impossible to determine which or what portion of said rolls of barbed wire should be delivered to Gonzalez & Blanco under its negotiable order bill of lading LA 22 and which or

what portion of said rolls of barbed wire should be delivered to plaintiff. That included in said two shipments of approximately 3800 tons of barbed wire there were only approximately 1500 tons of good wire, and substantially all the balance of said 3800 tons of said barbed wire was rusty and non-merchantable for export sale in South America, as herein elsewhere found, and was unacceptable to Gonzalez & [273] Blanco under order bill of lading LA 22. That over plaintiff's repeated protests to Matson, during the time of unloading and delivery of said 3800 tons of wire, War Shipping Administration and Matson knowing that bill of lading LA 22 was an order bill of lading and had been endorsed to Gonzalez & Blanco permitted Gonzalez & Blanco to remove said 1500 tons of good wire from the dock at Long Beach and refused to permit any selection of good, non-rusty wire by plaintiff from said 3800-ton shipment until Gonzalez & Blanco had satisfied their demand for 1500 tons of good wire under order bill of lading LA 22. That Matson and War Shipping Administration at all times pertinent hereto knew that bill of lading LA 22 was a clean, order, bill of lading for 1500 tons of barbed wire, obligating Matson and War Shipping Administration to deliver to the holder thereof 1500 tons of non-rusty wire and also knew that the remainder of the approximately 3800 tons of barbed wire on said S.S. White Squall was covered by a straight bill of lading from Dulien to Dulien (LA-29) and not an order bill of lading, but did not inform plaintiff thereof until on or about the 10th day of

September, 1946. At all such times Transmarine Navigation Company was acting as terminal operator for said War Shipping Administration in conducting terminal operations at Pier A, Long Beach, under and pursuant to its contract with said War Shipping Administration, No. WSA 4-803 (Exhibit M-B-7), and delivered said wire to Gonzalez & Blanco upon express orders to that effect received by it, Transmarine Navigation Company, from Matson.

XVIII.

That substantially all the wire made available to and delivered to plaintiff under his purchase from Dulien, and which plaintiff was permitted to remove from the dock after the bank's payment of \$214,000.00 to Dulien, was, at the time of delivery thereof to plaintiff, badly rusted and was inferior in all respects to the representations and warranties of Dulien to plaintiff of [274] its condition and to the rolls and cuttings which were exhibited to plaintiff as samples on July 11th and 12th, 1946; that some of it was so rusty that it could easily be broken with the bare hands of an ordinary person; much of it was covered and caked with mud; and the entire shipment when unloaded on the dock at Long Beach was unmerchantable and of a then undetermined value; that it consisted of approximately 55,428 rolls; that no substantial portion of it was of the quality warranted by Dulien; and that although some of [275] said 55,428 rolls were good, they were so few in number and so interspersed among and comingled with the great quantity of bad wire

that it can only be said, and the Court finds, that the entire shipment of 2300 tons under bill of lading LA 29 was badly rusted and was unmerchantable in that it was in such poor condition that the reasonable market value thereof was not, nor would or did it bring on sale thereof, anything approaching the value it would have had, or the sale price it would have brought, or the price which plaintiff had agreed to pay Dulien therefor, if it had been wire of the quality and in the condition which Dulien warranted and agreed to deliver to plaintiff.

That when Dulien executed the sale order to plaintiff on July 12, 1946, and at all times thereafter it knew full well the true condition of said wire. That Dulien had purchased said wire from the Department of Interior of the United States in the Spring of 1946, as surplus unused barbed wire and Louis Dulien, the President of both defendant Dulien corporations, himself had seen it in Hawaii; and after its said purchase Dulien had, with full knowledge of its bad condition, caused it to be oiled in Hawaii, for the purpose of preventing further rust and more particularly for the purpose of concealing the then obviously existing rust from prospective buyers thereof.

XIX.

That upon the surrender of bill of lading LA 29 by Dulien to Matson on Monday morning, July 29, 1946, because it was a non-negotiable straight bill of lading, which in the ordinary course of Matson's business was regarded as "spent" or "accomplished"

when surrendered by the consignee, it was by Matson not considered of any particular importance and it was filed in one of Matson's inactive files at Matson's Wilmington office. Thereafter, in an effort to ascertain what kind of bill of lading the bank had received from Dulien, plaintiff, not knowing that the bank had not [276] received any bill of lading at all, inquired of Matson's Wilmington office and Matson's Los Angeles office about the whereabouts of the bill of lading and in response thereto Matson repeatedly and continuously, in August and September of 1946, both directly and indirectly, informed plaintiff that the original bill of lading LA 29 had never been surrendered to Matson. Shortly after the above-entitled action was filed Matson searched for said original bill of lading LA 29 and failed to find it but did find a carbon copy thereof, as issued in Honolulu, and said carbon copy of said bill of lading LA 29 was produced by Matson during the taking of a deposition prior to the date of trial and a photostatic copy thereof was attached to Matson's answer filed herein. In said answer, filed September 15, 1948, Matson alleged that the original bill of lading LA 29 had never been surrendered to Matson. On April 10, 1950, the day prior to the date this case was then set for trial, while a search was being made by Matson at its Wilmington office, pursuant to a subpoena duces tecum for certain other documents, including the original bill of lading LA 22, Matson, for the first time after this action was filed, found the original bill of lading LA 29 in one of its

inactive files, and such discovery was by Matson's attorneys immediately reported to the attorneys for all other parties in the above-entitled action, together with the circumstances in connection with such discovery, and said bill of lading was shown to all such attorneys immediately and a few days prior to the date of trial, and was received in evidence as Exhibit C-N.

XX.

That Matson, acting under the express orders of War Shipping Administration, refused to recognize any obligation on its part or that of War Shipping Administration to plaintiff under said bill of lading LA 29 and refused to permit plaintiff to select and take delivery of any good wire from said 3800 ton shipment until Gonzalez & Blanco had first made its selection of 1500 tons of good wire [277] under its order bill of lading LA 22 and had taken delivery thereof, and caused to be delivered to Gonzalez & Blanco by Transmarine Navigation Company, and gave to Gonzalez & Blanco the right to select and choose and remove from said dock at Long Beach, over plaintiff's repeated protests, said 1500 tons of good wire; and the balance of said shipment consisting, as hereinbefore found, of substantially 2300 tons of bad, rusty, muddy, breakable, unmerchantable, wire was made available to Dulien and plaintiff. That under the permission of Matson and War Shipping Administration delivery of approximately 300 tons was taken by Dulien at the dock at Pier 1-A, Long Beach, from Transmarine Navi-

gation Company in December, 1946, pursuant to the order of Dulien contained in a letter from Dulien to Matson dated August 28, 1946 (Exhibit 67), and the balance of the substantially 2300 tons of bad, rusty, muddy, breakable, unmerchantable wire, was made available to plaintiff as aforesaid and herein elsewhere found.

That at all times Matson refused to recognize that plaintiff had any rights under said bill of lading LA 29 or any rights other than the rights of a purchaser of 2000 tons of barbed wire from Dulien, because plaintiff had not presented bill of lading LA 29 or any bill of lading to Matson and did not have possession of such or any bill of lading covering said barbed wire, or any portion thereof, and because in any event said bill of lading LA 29 was a straight bill of lading from Dulien as consignor to Dulien as Consignee and was not a negotiable order bill of lading. At all times hereinabove mentioned and in connection with its aforesaid acts, Matson was acting solely as berth agent for the War Shipping Administration under and pursuant to its contract with the War Shipping Administration (Exhibit 61) and under the express orders and directions of said War Shipping Administration, Matson's principal.

XXI.

That plaintiff in all his conduct in regard to the wire [278] after said payment to Dulien of \$214,000.00 by defendant bank on July 29, 1946, and after his discovery of the bad condition of the wire,

acted with diligence, efficiency and promptness and due regard for the rights of the defendants and respondents, and did everything which he could do or which was reasonably required of him in regard thereto in mitigation of the damages he had then suffered as herein elsewhere found. That he kept all of the defendants and respondents informed of his plans, his efforts and his conduct in that regard and gave them ample notice and opportunity to better the situation if they had been inclined so to do.

XXII.

That at no time prior to August 23, 1946, did plaintiff know, or even suspect, or have any reason to suspect, that the bank had paid the \$214,000.00 to Dulien without obtaining the required bill of lading. That the first suggestion plaintiff received to that effect was on August 23, 1946, at the office of Koppel Bros. in Wilmington; and the first actual knowledge or first-hand information he received to that effect was received by him September 4, 1946, when at Dulien's office, L. P. Stanley (who was employed by Dulien) informed him that the bill of lading had not been delivered to the bank at all but had been surrendered by Dulien to Matson at Matson's Wilmington office and left there at the time the freight bill was paid and prior to the presentation by Dulien to the bank of the letter of credit (Exhibit 5) and Dulien's demand for payment thereof and the payment thereof to Dulien by the bank on July 29, 1946.

That everything of consequence which plaintiff

did in regard to the wire after that discovery was done after ample notice and opportunity to the defendants and respondents to better the situation, and with the full knowledge of Matson and the full knowledge and consent of the bank and Dulien, which consent, however, was given under an agreement that it be without prejudice to the rights of any of the parties hereto against any of the other parties hereto. [279]

XXIII.

That there was no failure on plaintiff's part in any respect to do everything reasonably required of him in mitigation of damages after his discovery of the bad condition of the wire and after his discovery still later of the fact that the Bank had breached its letter of credit contract by paying Dulien without obtaining the required bill of lading. That plaintiff is not estopped from claiming, and the Court hereby finds that he is entitled to claim and that it is true, that at no time was there an acceptance of the wire by him; that he never freely and voluntarily accepted any of it, but that he rejected all of it and after such rejection took 1,913.3325 tons of wire as herein elsewhere found only because he had no reasonable alternative but to mitigate the damages by salvaging what he could from it and then bring this action against the defendants for damages. That when he first took delivery of any of the wire his money had already been paid out by the Bank for it and none of the defendants or respondents would or did then assume any responsibility for the poor condition of the

wire or for its removal from the dock, or for the return of plaintiff's money to him. That never at any time did plaintiff approve or authorize in advance or ratify afterward the Bank's payment to Dulien upon the receipt of the freight bill instead of the required bill of lading. That he did not tell Mr. Thomas Moran, or anyone else acting for the Bank, that he approved payment upon a straight bill of lading or any bill of lading other than that required by the language of the letter of credit. That he did not, nor did any agent of his, nor did any person acting on his behalf, ever receive from the Bank or from anyone else the bill of lading required by the terms of the letter of credit or any bill of lading, nor did plaintiff or any agent of his have knowledge of any of the terms of, or description of the wire contained in, bill of lading LA 29 [280] (Exhibit C-N) until long after the Bank had paid Dulien \$214,000.00 as aforesaid. That the reference in the undated delivery order from Mattoon & Co. to Matson (Exhibit C-U) to "bill of lading LA 29 attached" was incorrect and that no bill of lading was attached to said delivery order or had ever been in the possession of Mattoon & Co. or the Bank.

XXIV.

That plaintiff in mitigation of damages and after ample prior notice to defendants and with their full knowledge did everything reasonably within his power to dispose of all said wire to the best advantage and at the highest available prices, and he did obtain the highest available prices therefor. That

prior to the issuance of letter of credit (Exhibit 5) and prior to the time of the arrival of the S.S. White Squall with the wire on board, plaintiff had agreed to sell 1,000 tons of barbed wire to Alberto Echavarria of the city of Medellin, Colombia, at the rate of \$160.00 per ton. That on account of the bad, rusty condition of the wire, it was rejected by the said Alberto Echavarria at the agreed price and plaintiff was forced to accept and did accept therefor, from the said Alberto Echavarria, the sum of \$75.00 per ton, f.o.b. at Los Angeles, for 1,025.99 tons shipped to Colombia in 1946. That said sale price of \$75.00 per ton paid by Alberto Echavarria was a reasonable price for the wire so purchased by him in its rusty condition, and the acceptance thereof by plaintiff was in good faith and in mitigation of damages. That plaintiff took delivery from Transmarine Navigation Company of what was represented to him as being approximately 2,000 tons of barbed wire, but actually received only 1,913.3325 tons of wire on the dates and in the amounts hereinafter in this paragraph set forth, and received the following sums of money from the following purchasers for the following quantities of wire sold by him, including the 1,025.99 tons sold as aforesaid to the said Alberto Echavarria, of Medellin, Colombia; [281] and the prices at which all said sales were made were in each instance the reasonable value of the wire so sold in its rusty condition, and plaintiff's acceptance thereof was in good faith and in mitigation of damages:

1025.99 tons of wire purchased by Alberto Echavarria and shipped to Colombia on:			
	Tons	Ton Price f.o.b. L.A.	Amount Received
August 9, 1946	112.75	\$75.00	\$ 8,456.25
August 20, 1946	413.1845	75.00	30,988.50
September 29, 1946	500.06	75.00	37,504.50
Wire sold to Gonzalez & Blanco:			
a. Sept. 27, 1946, for experi- mental pickling for the pur- pose of determining price at which Gonzalez & Blanco would buy balance of wire....	24.30	65.00	1,579.50
b. Under contract of October 22, 1946	734	51.00	37,434.00
Plus flat extra agreed .. payment of			1,000.00
c. May 6th, 1947	104	4.50	468.00
Wire shipped to Colombia on May 4, 1947, and sold there.....			
	25.0425	7.50	187.81
Interest paid by Gonzalez & Blan- co on May 23, 1947, on deferred purchase price for 734 tons above mentioned			
			222.73
Total received by plaintiff....	1913.3325		\$117,841.29

XXV.

That by reason of the bad condition of the wire so delivered to plaintiff at Long Beach there was no market for it in Southern California or the United States for domestic use.

That from the time that said wire was unloaded on the dock at Long Beach no one of the defendants or respondents was willing to, or did voluntarily, assume any responsibility in regard thereto except that Matson, acting as agent as aforesaid, and War Shipping Administration gave Gonzalez & Blanco

the above-mentioned priority of selection of good wire from the total cargo of 3,800 tons on board said S.S. White Squall and Dulien removed and retained for Dulien approximately 300 tons as elsewhere herein found; and that with those exceptions the defendants and respondents and each of them by their acts, statements and omissions in relation to the wire, gave plaintiff clearly to understand that the responsibility for the disposition thereof lay with plaintiff, and that if anything was to be done about it he would have to do it. That from and after August 21, 1946, demurrage was accruing upon such of the wire as remained on the dock and the dock authorities wanted it moved and plaintiff was aware of those facts. That in order to ascertain the reasonable market value in Los Angeles County for export of the wire made available and delivered to and taken by plaintiff as herein elsewhere set forth and to determine what could and should be done with it, and to minimize the loss thereon and mitigate the damages to plaintiff proximately caused by defendants Duliens' breach of warranty and the Bank's breach of contract as herein elsewhere found, and in connection with and in order to effect such sales so made by plaintiff in mitigation of damages, it was reasonably necessary that there be expended, and plaintiff for that purpose prior to October 22, 1946, did expend the following sums of money, or incurred the following obligations, in the necessary selection, segregation and moving of said wire on and from the dock, and in wharf and dock charges which accrued thereon

while said wire remained upon the dock at Pier A, Long Beach, while plaintiff was trying to dispose of it, to wit: [283]

Item	Amount
Dock storage	\$2,837.45
Inspection by Los Angeles Cargo Appraisers	39.85
Segregation and supervision	48.00
Extra drayage on account of poor condition of wire	130.50
Sorting labor on account of poor condition of wire	2,734.86
Extra charges made by Mattoon & Co., Inc.	750.00
Total	<u>\$6,540.66</u>

That all of said special expense items, totaling \$6,540.66, were paid or incurred by October 22, 1946.

XXVI.

That for the purpose of mitigating the damages proximately caused by Dulien's breach of warranty and the Bank's breach of contract as herein elsewhere found, it became and was necessary that plaintiff remain in California, devoting his time and business efforts to the matter of the sale of said wire until proper disposition thereof could be made, and he did remain in California away from his own country and business for three months, that is, from July 29, 1946, until about November 1st, 1946, for that purpose. That his reasonable living and incidental expenses on account of such stay, and during that time, amounted to \$3,000.00.

That within that time he necessarily spent that amount and the expenditure thereof in his mitigation efforts was justified by the fact that by so remaining and personally attending to the matter he effected sales for substantially more money net, after the deduction of such expenses, than would have been realized otherwise. [284]

XXVII.

That said gross amount of \$117,841.29 so received by plaintiff from the sale of said wire, as hereinbefore stated in paragraph XXIV, was the value on July 29, 1946, and at all times thereafter up to and including the respective dates of sales of the respective portions thereof, of the wire which plaintiff received from Dulien; and after deducting therefrom the above-enumerated expenses of \$6,540.66 and \$3,000.00, together totaling \$9,540.66, plaintiff's net recovery from the sale of said wire was \$108,300.63. That all of the items making up said total expenses of \$9,540.66 were reasonably and necessarily expended or incurred by plaintiff in his efforts to mitigate damages and were made necessary and were proximately caused by the failure of Dulien to perform the contract of Dulien with plaintiff and by the failure of the Bank to perform its contract with plaintiff, both as herein elsewhere found.

XXVIII.

That the reasonable market value in Los Angeles County, California, on July 29, 1946, for export in ten lots of merchantable black barbed wire free

from rust, of the type and quality of the wire which Dulien agreed to sell and warranted to plaintiff, was \$130.00 per ton, or \$130,000.00 for 1,000 tons, and under plaintiff's contract of purchase with Dulien plaintiff was entitled to receive from Dulien 1,000 tons of such wire. That the reasonable market value in Los Angeles County, California, on July 29, 1946, for export in ton lots of merchantable galvanized barbed wire, free from rust, of the type and quality of the wire which Dulien agreed to sell and warranted to plaintiff, was \$160.00 per ton, or \$160,000.00 for 1,000 tons, and under plaintiff's contract of purchase with Dulien plaintiff was entitled to receive from Dulien 1,000 tons of such wire. That the reasonable market value for export of 2,000 tons of such wire, consisting of 1,000 tons of each kind, on July 29, 1946, was \$290,000.00. That the difference between the value of the wire delivered to plaintiff at the times of the delivery thereof to him [285] and the value which said wire would have had if it had answered to the warranty thereof made to plaintiff by Dulien as aforesaid was the sum of \$172,158.71.

That the said expenses of \$9,540.66 set forth in paragraph XXV were all necessarily incurred and expended by plaintiff in order that the above-mentioned gross sum of \$117,841.29 might be obtained from said mitigation sales set forth in paragraph XXIV, and if said expense items had not been so expended by plaintiff there would not have been received from said mitigation sales as large a net recovery as was obtained by reason of such

expenditures. That, therefore, plaintiff is either entitled to have the value of said wire as of July 29, 1946, determined as against Dulien in the amount of said gross receipts of \$117,841.29 less said expenditures of \$9,540.66, that is, \$108,300.63, or he is entitled to have such value as of July 29, 1946, determined in the sum of \$117,841.29 and to recover from Dulien as special damages arising from the special circumstances set forth in paragraphs XXV and XXVI in the amount of such expenditures, to wit, \$9,540.66. The Court therefore finds that the gross amount of \$117,841.29 so received by plaintiff from the sale of said wire was the value on July 29, 1946, and at all times thereafter up to and including the respective dates of the sales of the respective portions thereof, of the wire which plaintiff received from Dulien; that plaintiff is therefore entitled to recover from Dulien the difference between \$290,000.00, the value which said wire would have had if it had complied with Dulien's warranty, and the said sum of \$117,841.29, to wit, \$172,158.71, and in addition thereto as special damages by reason of the above-found special circumstances the above-stated sum of \$9,540.66, making a total damage for which defendants Dulien are liable to plaintiff the sum of \$181,699.37, as of July 29, 1946. That is to say, plaintiff's total damage proximately caused by Dulien's breach of warranty [286] is the sum of \$299,540.66, against which there should be set off the sum of \$117,841.29, which is the amount received by plaintiff in mitigation and diminution of

damages, leaving plaintiff's net damages for which defendants Dulien are liable to plaintiff the sum of \$181,699.37 as of July 29, 1946.

XXIX.

That on July 29, 1946, when the defendant Bank paid the money to Dulien, as herein elsewhere found, the plaintiff was damaged in the sum of \$214,000.00 by the act of the Bank in the payment of said money in violation of the contract between the plaintiff and defendant Bank, as herein elsewhere set forth. That the difference between the amount of \$214,000.00 paid out by the Bank contrary to the contract between the plaintiff and the Bank and the net amount of \$108,300.63 received by the plaintiff, as stated in paragraph XXVII hereof, upon the sales of wire made by him in his efforts to mitigate damages is \$105,699.37, as of July 29, 1946, which sum the Court finds is the plaintiff's net damage occasioned to him by the defendant Bank's breach of its contract with plaintiff. (See finding XXXIX.)

XXX.

That said two shipments of approximately 3,800 tons of wire for which bills of lading LA 29 and LA 22 were issued and which were shipped on the S.S. White Squall were made up of rolls of several standard weights. That the majority of them were what were commonly known as 103-lb. rolls, sometimes called 100-lb. net rolls, but that there were an undetermined number of what were commonly

known as 56-lb. rolls, and an undetermined number of what were commonly known as 23-lb. rolls. That many of the records of deliveries of portions of said wire show only the number of rolls in a particular delivery without any language or other [287] indication from which can be determined either the apparent or the actual weight of such rolls, and in regard to many deliveries from the dock there are not available any scale records showing the actual weight of the rolls. That therefore there cannot be determined from the records available the exact weight of the wire unloaded from the White Squall at Long Beach; and for the same reason there cannot be determined the exact weight of the wire covered by bill of lading LA 29 which was made available to and delivered to plaintiff or to Gonzalez & Blanco, on its purchase from plaintiff, or to Dulien on its reservation of 300 tons. That the majority of the delivery records report the weight of the wire removed under bill of lading LA 29 as the weight calculated by multiplying the number of rolls appearing to be 23-lb. rolls by 23, multiplying the number of rolls appearing to be 56-lb. rolls by 56, and multiplying the number of rolls appearing to be 103-lb. rolls by 103, instead of the actual weight of each roll. That plaintiff's purchase order contract, as amended to reduce the amount of the order, called for 2,000 tons of barbed wire without reference to number of rolls or weight of individual rolls. That the wire removed by plaintiff and shipped to South America was actually weighed on scales and the actual weight was reported on the

delivery records. That the wire sold by plaintiff to Gonzalez & Blanco was sold by calculated weight upon the agreed assumption that each roll appearing to be a 23-lb. roll weighed 23 pounds, and that each roll appearing to be a 100-lb. roll weighed 100 pounds, and so on, without any actual weighing of said wire upon delivery to Gonzalez & Blanco. That by reason of the failure of all parties handling said wire except the plaintiff to make or keep accurate records of the exact weight of the wire and from all the evidence in the case the Court finds that the measure of damages and mitigation thereof is to be calculated in terms of dollars regardless of the actual weight in pounds or tons of wire. That it is immaterial whether plaintiff actually got [288] 2,000 tons of wire or 1,913.3325 tons of wire, or any intermediate amount, because the transaction was an entire transaction and plaintiff did everything he could do to obtain, and he did obtain, the highest available price and value for all the wire which he did get.

That the evidence preponderates to the effect, and the Court finds, that any discrepancies in the records between the number of rolls shown to have been loaded on the "White Squall" at Honolulu and the number shown to have been unloaded at Long Beach are relatively inconsequential in a 2300-ton shipment and therefore too small for the Court to take cognizance of; that any differences reported in said records between the weight of wire as mathematically calculated, as aforesaid, and the actual weight of the same wire as it might have been

determined by being weighed on scales is likewise inconsequential. Therefore the Court finds that there was no shortage in the carrier's delivery of wire at the dock at Long Beach, but that all the wire delivered to the carrier, United States of America, by Dulien at Honolulu under bill of lading LA 29 was delivered by the carrier at the dock at Long Beach for Dulien; that plaintiff has correctly reported by weight and in dollars all dispositions made by him or on his behalf of wire unloaded from the White Squall at Long Beach under bill of lading LA 29, as heretofore found in paragraph XXIV; that plaintiff fully preformed any and all duties which rested upon him to mitigate damages, and that upon the trial he fully and accurately reported all sales of wire made by him or on his behalf and all moneys received from such sales; that by way of credit to defendants Dulien and the Bank against moneys received by plaintiff from such sales in mitigation of damages plaintiff is properly chargeable with only such actual net amount of money as he did receive from such sales after the deduction of his necessary expenses; and that the net amount so received by him was [289] \$108,300.63.

XXXI.

That at no time between July 29, 1946, and December 31, 1946, was there available to plaintiff in the State of California barbed wire of the type and quality which Dulien agreed to sell and warranted to plaintiff, which plaintiff could have obtained from any other source as a substitute for

that which Dulien had failed to deliver according to its warranty, and at all such times Dulien well knew that fact. That at the time of plaintiff's purchase of wire from Dulien plaintiff had no intention, nor any idea, of selling any of such wire in the United States of America, or in any of its Territories or possessions. That plaintiff's original and sole purpose in purchasing wire from Dulien was to ship it to his own country in South America (Colombia) for resale, and on July 11th and 12th, 1946, he so informed Dulien, and when Dulien accepted his order Dulien knew of plaintiff's said purpose and plan. That Dulien at all times in the years 1946 and 1947 knew the condition of the barbed wire market at Los Angeles and in the United States generally and in South America, and knew the demand for and the value of and market price of barbed wire and particularly of good non-rusty, merchantable barbed wire in ton lots for export at Los Angeles; that at all times on or between July 11th and July 29th, 1946, defendant Bank knew, but Dulien did not know, that plaintiff had a customer in Colombia ready, willing and able to pay plaintiff the market price for export at Los Angeles, to wit, \$160.00 per ton, for 1,000 tons of barbed wire of the quality ordered by plaintiff from Dulien and that said customer had made an advance payment to plaintiff of \$160,000.00 upon such purchase; but Dulien did at such times know that there was an export market in Los Angeles for good non-rusty, merchantable black and galvanized wire at prices

in excess of the price per ton which plaintiff agreed to pay Dulien as herein elsewhere found.

XXXII.

That coincident with the letter of credit transaction the [290] Bank agreed to loan and did thereafter loan to plaintiff at his special instance and request the sum of \$54,535.00 and plaintiff orally agreed with the bank on July 27, 1946, to give the Bank as security for said loan a lien upon the wire for the purchase price of which the letter of credit was bought by plaintiff from the Bank and to evidence said loan and said lien by a promissory note. That plaintiff thereafter did give the Bank such a lien when on July 31, 1946, not knowing the bad condition of the wire or that the Bank had not obtained the required bill of lading thereon, and being then informed by the Bank that it had received the bill of lading in accordance with its contract and believing and relying thereon, he made, executed and delivered to the Bank his promissory note which was admitted in evidence as Exhibit 22-a and the collateral agreement which was admitted in evidence as Exhibit 21. That the Bank thereafter claimed, exercised and acted upon and under said note and collateral agreement when it authorized, instructed and required, and the Court finds that the Bank did authorize, instruct and require, that Mattoon & Company, the ocean freight forwarders handling the shipping arrangements and the documents on said wire, protect the Bank's interest in said wire by obtaining and transmitting direct to

the Bank the title papers on the wire thereafter to be shipped and which was shipped to South America by Mattoon & Company, and on that which was sold to Gonzales & Blanco in Los Angeles, pursuant to plaintiff's instructions. That \$54,000.00 of the amount so loaned to plaintiff was simultaneously on July 31, 1946, paid by plaintiff to the Bank in full discharge of the balance on the purchase price of said letter of credit, and the remaining \$535.00 thereof was simultaneously by plaintiff paid to the Bank in full payment of the Bank's letter of credit service charge. That the service for which said \$535.00 charge was made to plaintiff was not preformed, in that the plaintiff's instructions to the Bank contained in the letter of credit and the application therefor were not carried out, as aforesaid; and therefore the consideration for said service charge failed. That the amount of interest which has been charged by the [291] Bank upon plaintiff's said note as upon the \$535.00 portion of the principal to and including June 15, 1950, is \$103.63, and that the total of said \$535.00 principal and \$103.63 interest, amounting to \$638.63 is properly deducted from, and is not due or payable upon, plaintiff's said note. That after the deduction of said credit of \$638.63 the amount remaining unpaid on June 15, 1950, on the principal of said note was \$14,074.10 and on the interest \$2,812.10, and additional interest has since accrued on said principal balance at 5% per annum to November 16, 1950, amounting at \$58.64 per month to \$295.15, making a total of \$17,181.35 on said counterclaim,

and that after Nov. 16, 1950, additional interest will accrue on the principal at the rate of \$1.95 per day. That Mattoon and Company fully complied with the Bank's instructions for the protection of its lien on said wire, and in so doing acted as the agent of the Bank, and all of the money received from sales of said wire to Gonzalez & Blanco was transmitted direct to the Bank and by the Bank applied first upon expenses of such sales or charges against said wire and then upon plaintiff's said note, thereby reducing said note, and it was so reduced, to the balance above mentioned. That none of said wire was released to or for plaintiff or for sale or shipment by or for him except upon the authorization or consent of the Bank.

XXXIII.

That it is not true that the provision on plaintiff's application for said letter of credit (Exhibit 4) providing that a negotiable order bill of lading be presented, endorsed in blank, was inserted in said application and said letter of credit at the sole instance and request of the Bank; but it is true that plaintiff requested and demanded the insertion of such provision and that the language of such provision was, by Wm. H. Schroeder, Vice President of the Bank, in the plaintiff's immediate presence and hearing on July 27, 1946, dictated to his (Schroeder's) secretary and that pursuant to such dictation said provision was written into said application. [292]

That it is not true that said last mentioned pro-

vision was inserted in each of said last mentioned documents for the sole benefit of said defendant Bank as a lien holder on said wire; but it is true that said provision was inserted both for plaintiff's protection against the possible payment of his money without the receipt of the specified documents and for the Bank's protection as a prospective lien holder on said wire. That it is not true that plaintiff released defendant Bank on July 29, 1946, or at any other time, from the provision of said application for letter of credit and of said letter of credit providing that a negotiable order bill of lading should be presented or from said provision of either of them; and it is not true that plaintiff orally or otherwise or at all agreed with defendant Bank that a straight non-negotiable bill of lading might be accepted or that the required bill of lading might show a consignment from Dulien to Dulien; and it is not true that the Bank on July 29th, 1946, (as is alleged by the Bank in paragraph 5 of the Second Defense contained in its Answer), or at any other time or at all, released plaintiff from the provisions of said application for letter of credit and of said letter of credit providing that a negotiable order bill of lading be presented or from said provision in either of said documents; and it is not true, as is in said allegation implied, that the Bank had any right to, or could, or did, alter or waive in any manner either the plaintiff's rights or privileges or the Bank's obligations and duties by the claimed "releasing" of the plaintiff therefrom, or otherwise, nor is it true that in any manner what-

ever plaintiff at any time, or at all, release the Bank from its obligation of full compliance with the requirements of the letter of credit and the application therefore or either of them.

XXXIV.

That it is not true that Mattoon & Company in its activities in connection with the barbed wire was acting as the agent solely of plaintiff; but it is true that Mattoon & Company was acting [293] as the Bank's agent regarding said wire while and so long as the Bank had a lien thereon and until from time to time portions of it were released by the Bank either for shipment to South America or for sale to Gonzalez & Blanco; that it is true that Mattoon & Company were independent ocean freight forwarders and shipping agents and that in the ordinary course of their business in this barbed wire transaction they from time to time preformed different duties for different principals, for the Bank at times and for the plaintiff at times, depending upon the particular service being at the moment performed.

XXXV.

That it is true that plaintiff in writing agreed with defendant Bank that the Bank should not be responsible for the character, quality, quantity, condition or value of the property represented by the documents required by the letter of credit or for any difference in character, quality, quantity, condition or value of the property from that to be expressed in the required documents, all as appears

in paragraph 9 of the letter of credit guarantee (Exhibit 5a); but such provision did not, and was never intended to, apply to the Bank's liability for, or in the event of, its failure to obtain the required documents; and the Court finds that the Bank deals in documents and not in merchandise and that such provision for exemption from liability was predicated and conditioned upon the receipt by the Bank of the precise documents called for by the letter of credit, and that when the Bank paid out plaintiff's \$214,000.00 without receiving such precise documents so required, such exemption provision did not relieve the Bank of its responsibility to plaintiff for the damage proximately caused to the plaintiff by breach of the Bank's letter of credit contract as herein elsewhere found, to wit, the sum of \$214,000.00 plus plaintiff's special damages of \$9,540.66 as found in paragraphs XXV and XXVI hereof less the sum of \$117,841.29 received by [294] plaintiff in mitigation of damages as found in paragraph XXIV hereof. The Court further finds that for the foregoing reasons the Bank did not warrant the condition of said wire and therefore the measure of plaintiff's damages against the Bank is thus different from and less than the measure of plaintiff's damage against Dulien, both as herein elsewhere found.

XXXVI.

That the Bank's payment of Dulien's draft without obtaining the documents specified in and required by the letter of credit was a breach of

the contract between plaintiff and the Bank and was the result of carelessness and negligence on the part of the Bank all as herein elsewhere found. [295]

XXXVII.

That there was a breach of warranty by Dulien Steel Products, Inc., of California, a California corporation, and by Dulien Steel Products Inc., a Washington corporation, and by each of them, as to the quality of the wire sold and delivered to plaintiff; that plaintiff suffered loss which in the ordinary course of events directly and naturally resulted from said breach of warranty, and plaintiff was damaged by said defendants Dulien and each of them by reason of said breach of warranty in the total sum of \$290,000.00 as of July 29, 1946, said sum being the value which said wire would have had to plaintiff if it had answered to the warranty made to plaintiff by said defendants Dulien, and in the additional sum of \$9,540.66 special damages arising from the special circumstances set forth in paragraphs XXV and XXVI, or a total of \$299,540.66. That from said total of \$299,540.66 defendants Dulien are entitled to have deducted the sum received by plaintiff in mitigation of damages from the sale of the wire actually delivered to him, to wit, \$117,841.29, which said sum of \$117,841.29 the Court also finds to be the value of the wire delivered to plaintiff at the times of delivery thereof to plaintiff; and that the amount of plaintiff's net loss and damage for which defendants Dulien are liable to plain-

tiff is the difference between those two amounts, to wit, \$181,699.37, as of July 29, 1946.

XXXVIII.

That plaintiff is entitled to judgment against Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, and each of them in the sum of \$181,699.37, together with interest thereon at the rate of 7% per annum from July 29th, 1946 until the date of the signing of judgment herein, which total sum is \$236,355.51 on this date, viz. Nov. 16, 1950.

XXXIX.

That there was a breach by the defendant Citizens National [296] Trust & Savings Bank of Los Angeles of its letter of credit contract with plaintiff; that plaintiff suffered loss which in the ordinary course of events directly and naturally resulted from said breach of contract by said defendant Bank; and that plaintiff was damaged by reason of said breach of contract by said defendant Bank in the sum of \$214,000.00 on July 29, 1946, and in addition thereto in the sum of \$9,540.66 as special damages arising from the special circumstances set forth in paragraphs XXV and XXVI, making a total of \$223,540.66, against which defendant Bank is entitled to a credit in diminution of damages in the amount of \$117,841.29 realized by plaintiff in mitigation of damages, leaving plaintiff's net damages against defendant Bank, before any credit to the

Bank on its counterclaim, in the sum of \$105,699.37 as of July 29, 1946; that plaintiff is entitled to interest on said sum of \$105,699.37 from July 29, 1946, until paid at the rate of seven (7%) per cent per annum, which total sum, together with interest, is \$137,494.23 on the date hereof viz. Nov. 16, 1950.

XL.

That on its counterclaim against plaintiff, on plaintiff's promissory note of July 31st, 1946, held by the Bank the defendant Bank is entitled to a credit on said judgment in plaintiff's favor in the amount of \$14,074.10 principal, plus interest of \$3,107.25 at 5% per annum to Nov. 16, 1950, totaling \$17,181.35; and that additional interest will accrue on said counterclaim from and after Nov. 16, 1950, at the rate of \$1.95 per day, until the date of the signing of judgment herein.

That after the deduction of said credit by way of counterclaim, to wit, the sum of \$17,181.35 to date hereof, from the total sum found in paragraph XXXIX, to wit, the sum of \$137,494.28 the net amount to which plaintiff is entitled to judgment against said defendant Bank as of the date of the signing hereof is \$120,312.88 (see computation made in accordance with [297] Local Rule 7 (h) attached hereto and to the judgment).

XLI.

That as set forth in paragraphs XXXVIII and XXXIX of these Findings plaintiff is found to be entitled to interest at the statutory rate of 7% per annum from July 29, 1946, on \$181,699.37, [298]

the net amount of defendants Dulien's principal obligation, and on \$105,699.37, the net amount of defendant Bank's principal obligation, after crediting in each case the full amount of all monies received by plaintiff from the sales of the wire by him in mitigation of damages as of the dates of such sales as they are shown in paragraph XXIV hereof, the last of which said receipts was the interest of \$222.73 received from Gonzales & Blanco on May 23, 1947. That such credits are allowed as though the full amount of \$117,841.29 received from said sales had been received by plaintiff on July 29, 1946, whereas, as is shown in said paragraph XXIV hereof, the several items constituting and making up said total of \$117,841.29 were received from time to time between July 29, 1946, and May 23, 1947. That plaintiff is legally entitled to be charged back with those transactions and, by being charged back with all those receipts in mitigation as of July 29, 1946, he is deprived of \$1,273.18 interest to which he is legally entitled. That on the other hand, by being credited as of July 29, 1946, with the special expense items disbursed by him between July 29, 1946, and November 1, 1946, as in paragraph XXXVII hereof he is credited, he is given credit for interest on the several items making up that \$9,540.66 special expense total for a maximum period of time, as to some portions thereof, up to November 1, 1946, (see paragraph XXV, page 29, and paragraph XXVI, page 29, hereof), and the maximum excess interest for which he thus gets credit on said special expense disbursements is

\$158.01. That the difference between said two interest items is \$1,115.17 in plaintiff's favor, but the plaintiff does not press his claim for such additional interest, and therefore the Court, giving the advantage in that regard to said defendants, finds that plaintiff has waived his right to such favorable interest balance of \$1,115.17 and is therefore entitled to interest on the sum of \$181,699.37 only from July 29, 1946, as against defendants Dulien, and to interest on the sum of \$105,699.37 only from July 29, 1946, as against defendant Bank, as set forth in paragraphs XXXVIII and XXXIX hereof. [299]

XLII.

That plaintiff is not entitled to any relief against defendant Matson Navigation Company, and for that reason Matson Navigation Company is not entitled to any relief on its cross-complaint against Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., or either of them.

XLIII.

That the claim of defendant and cross-complainant Matson Navigation Company set up in its cross-complaint against defendants Dulien is a claim contingent upon the recovery of judgment by plaintiff against Matson; and recovery being herein denied to plaintiff as against Matson, Matson is not entitled to any relief against Dulien. However, if upon appeal judgment should be ordered in favor of plaintiff and against Matson, then and in that event Matson shall be entitled to judgment over

against Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., on Matson's cross-complaint against defendants Dulien in an amount equal to the amount so recovered by plaintiff against Matson.

XLIV.

That plaintiff did not at any time agree to accept or accept, or authorize or approve or ratify the acceptance by anyone on his behalf of, the freight bill (Exhibit 7) or any other freight bill or any other document in lieu or place or stead of the required bill of lading; nor did plaintiff at any time in any manner authorize, approve or ratify the waiver by the bank of, or failure of the bank to comply with, the requirements of said letter of credit or authorize, approve or ratify the bank's payment to Dulien without the receipt of each and all and every one of the documents required by said letter of credit.

XLV.

That Dulien's said representations made to plaintiff on July 11th and 12th, 1946, as to the condition and quality of the wire being sold to plaintiff, were false; that they were made by Dulien knowing them to be false, knowing that plaintiff believed [300] them to be true and intended to rely and act upon them, and intending that plaintiff should rely and act upon them. That plaintiff had a right to, and did, believe and rely and act upon said representations, and did so to his damage, as aforesaid. That on July 29, 1946, when Dulien presented its draft to the bank in the sum of \$214,000.00 for payment in

accordance with said letter of credit Dulien then knew that the documents presented did not comply with said letter of credit and Dulien then knew and also knew when accepting payment of said draft that it could not then or at any other time or at all comply with the terms of said letter of credit or the said contract between plaintiff and Dulien.

XLVI.

That plaintiff had had other letter of credit transactions with the bank prior to July 27, 1946, and the bank knew that his purpose in purchasing said wire from Dulien was to export it to South America, and knew that he had one South American commitment on 1,000 tons of wire at \$160.00 per ton (see finding XXIV).

XLVII.

That when Dulien accepted the said letter of credit from plaintiff and presented its \$214,000.00 draft to the bank with said letter of credit, and demanded payment thereof Dulien became and was bound to the bank by the terms of said letter of credit, and to plaintiff as part of the contract between plaintiff and Dulien.

XLVIIa.

That it was not impossible for the bank on July 29, 1946, to comply with the contract between plaintiff and the bank as it was the duty of the bank upon presentation of the draft without the required documents to dishonor and refuse to pay said draft and return plaintiff's \$214,000.00 to him.

XLVIII.

That if the defendant bank had not violated its contract [301] and paid the \$214,000.00 to Dulien plaintiff would not have been damaged as the result of receiving bad wire from Dulien, and for that reason the equity is greater in favor of plaintiff being made whole by the full collection of the amount of his net damages against Dulien and the judgment therefor, with interest thereon until the date of full payment thereof, before defendant bank has the right of restitution by way of judgment over against Dulien. That therefore plaintiff is entitled to be made whole by the collection of the full amount of the judgment herein granted him against defendants Dulien before defendant bank be permitted to execute upon or in any other manner proceed against the assets of the defendants Dulien.

That defendant bank is entitled to judgment over against defendants Dulien for such sums of money as defendant bank may pay to plaintiff upon either of the judgments granted herein to plaintiff but will be entitled to execute on said judgment over only in the event and after plaintiff shall have received from defendants Dulien and defendant bank together sums of money aggregating the full amount of his judgment against defendants Dulien with interest thereon to the date of full payment thereof.

XLIX.

That except as hereinafter stated plaintiff is entitled to collect under the judgments herein granted him the full sum of \$120,312.88 as of the date hereof,

viz. Nov. 16, 1950, and interest to the date of payment thereof, plus costs, from the defendant bank independent of and without regard to his right to collect from defendants Dulien the amount of his judgment against defendants Dulien; and except as hereinafter stated plaintiff is entitled to collect the full sum of \$236,355.51 as of the date hereof viz. Nov. 16, 1950, and interest to the date of payment hereof, plus costs, from defendants Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, independent of and without regard to his right to collect from defendant bank the amount of his judgment against defendant bank; and until [302] he has collected from said defendants Dulien and the defendant bank or from said defendants Dulien alone the full sum of \$236,355.51 as of the date hereof, viz. Nov. 16, 1950, and costs, plus interest to the date of full payment thereof, the fact that he has a judgment against each of said defendants shall not, except as hereinafter stated, be a bar to his collection from the other of them of any balance which may be due on the judgment against such other; but plaintiff is not entitled in any event to collect on the judgments herein granted him against defendants Dulien and defendant bank any more in the aggregate than a sum equal to the full amount of the larger of the said judgments, to wit, \$236,355.51 the amount of the judgment against defendants Dulien, plus costs, with interest thereon to the date of full payment thereof. [303]

L.

The difference between the \$236,355.51 to which plaintiff is entitled as against defendants Dulien and the \$17,181.35 balance now remaining unpaid to defendant bank on plaintiff's said promissory note of July 31, 1946, is \$219,174.16. In the calculation of the amount to which plaintiff is entitled as against defendant bank there has been deducted, as above stated in Paragraph XL hereof, the amount now remaining unpaid on plaintiff's said note; but in the calculation of the amount to which plaintiff is entitled as against defendants Dulien no such deduction has been made because defendants Dulien are not entitled to any such credit; but if plaintiff collects from defendants Dulien the amount of said balance on his said note to the bank or any portion thereof after having been otherwise made whole as to everything to which he is entitled from defendants Dulien except the balance remaining unpaid on said note, to wit, except the last \$17,181.35 and interest on said note, then and then only will the bank be entitled to reimbursement by plaintiff on account of said note for any such actual recovery by plaintiff from defendants Dulien; and therefore the Court further finds that upon the collection by plaintiff of all or any portion of the last \$17,181.35 principal of said \$236,355.51 judgment against defendants Dulien the bank shall be entitled to be reimbursed by plaintiff to the extent of such collection, together with such interest thereon, up to but not exceeding 5% per annum, as plaintiff may collect thereon from defendants Dulien.

Conclusions of Law

From the foregoing facts the Court concludes:

I.

That many of the questions necessary to be determined are mixed questions of law and fact and for the purpose of clarity many conclusions of law are stated in the Findings of Fact, and for that reason all the conclusions of law which may appear in the Findings of Fact, whether herein specifically stated again or not, are hereby stated as conclusions of law.

II.

That there was a breach of warranty by Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, and each of them as to the quality of the wire sold and delivered to plaintiff.

[In margin]: Amended to add a paragraph purs. order filed and entered 12/7/50 in Judg. Bk. 69/502.
/s/ PH.

III.

That plaintiff is entitled to judgment against Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., and each of them, in the sum of \$181,699.27 plus interest thereon at the rate of seven (7%) per cent per annum from July 29, 1946, to the date hereof, viz. Nov. 16, 1950, to wit, the total of \$236,355.51. (See Computation made in accordance with Local Rule 7(h) attached hereto and to the judgment herein).

IV.

That as set forth in paragraphs XXXVIII and XXXIX of the Findings of Fact plaintiff is entitled to interest at the statutory rate of seven (7%) per cent per annum from July 29, 1946, on \$181,-699.37, the net amount of defendants Dulien's principal obligation, and on \$105,699.37, the net amount of defendant bank's principal obligation, after crediting in each case the full amount of all monies received by plaintiff from the sales of the wire by him in mitigation of damages as of the dates of such sales as they are shown in paragraph XXIV hereof, the last of which said receipts was the interest of \$222.73 received from Gonzalez & [304] Blanco on May 23, 1947. That such credits are allowed as though the full amount of \$117,841.29 received from said sales had been received by plaintiff on July 29, 1946, whereas, as is shown in said paragraph XXIV of the Findings of Fact, the several items constituting and making up said total of \$117,841.29 were received [305] from time to time between July 29, 1946, and May 23, 1947. That plaintiff is legally entitled to be charged back with those transactions as of the dates when they occurred and, by being charged back with all those receipts in mitigation as of July 29, 1946, he is deprived of \$1,273.18 interest to which he is legally entitled. That on the other hand, by being credited as of July 29, 1946, with the special expense items disbursed by him between July 29, 1946, and November 1, 1946, as in paragraph XXXVII of the Findings of Fact he is credited, he is given credit for interest on the several items

making up that \$9,540.66 special expense total for a maximum period of time, as to some portions thereof, up to November 1, 1946, and the maximum excess interest for which he thus gets credit on said special expense disbursements is \$158.01. That the difference between said two interest items is \$1,115.17 in plaintiff's favor. That the plaintiff having not pressed his claim for such additional interest, has waived his right to such favorable interest balance of \$1,115.17 and is therefore entitled to interest on the sum of \$181,699.37 only from July 29, 1946, as against defendants Dulien, and to interest on the sum of \$105,699.37 only from July 29, 1946, as against defendant bank, as in paragraphs XXXVIII and XXXIX of the Findings of Fact set forth.

V.

That the bank breached its letter of credit contract with plaintiff when on July 29, 1946, it paid out to Dulien plaintiff's \$214,000.00 without obtaining the required documents, particularly the required bill of lading. By reason of said breach of contract plaintiff is entitled to recover from defendant bank, for general and special damages as set forth in paragraph XXXIX of the Findings of Fact, the total sum of \$223,540.66 less \$117,841.29 by way of off-set in mitigation and diminution of damages to which defendant bank is entitled, that is, he is entitled to recover \$105,699.37 as of July 29, 1946, plus interest thereon at the rate of seven [306] (7%) per cent per annum from July 29, 1946, to the date hereof, against which the bank is further entitled

to a credit, by way of its counterclaim on plaintiff's note to the bank, in the sum of \$14,074.10 plus interest thereon at five (5%) per cent per annum from July 31, 1946; so that plaintiff is now entitled to judgment as of the date of the signing hereof viz. Nov. 16, 1950, in the sum of \$120,312.88. (See computation in accordance with local rule 7(h) attached hereto and to the judgment herein.)

VI.

That by reason of the failure of the bank to perform its letter of credit contract with plaintiff the bank is not entitled to recover from plaintiff anything by way of attorney's fees on plaintiff's said promissory note, either as a credit against the bank's obligation to plaintiff in damages or on the bank's counterclaim on said note or otherwise or at all.

VII.

That except as hereinafter conditionally provided the bank is not entitled to any relief from plaintiff on the bank's cross-complaint on plaintiff's promissory note. That in the calculation of plaintiff's damages against the bank, there has been fully allowed as a credit, by way of the bank's counterclaim, the amount remaining unpaid on plaintiff's said note with interest thereon to the date of signing of the judgment herein.

VIII.

That it was not impossible for the bank on July 29, 1946, to comply with the contract between plaintiff and the bank as it was the duty of the bank upon

presentation of the draft without the required documents to dishonor and refuse to pay said draft and return plaintiff's \$214,000.00 to him.

IX.

That the public has an interest in the proper performance by banks of their usual banking activities. That the issuance, sale and negotiation of letters of credit and the performance of [307] bank's contracts made in connection therewith are matters of general public interest, and the issuance, sale and negotiation of the letter of credit purchased by plaintiff from the bank in this case fall within that category. That the language of paragraph 9 of the letter of credit guarantee (Exhibit 5a) is not subject to the interpretation claimed for it by the bank in paragraph 7 of the bank's Second Defense of its Answer. That as so sought by the bank to be interpreted such paragraph is contrary to public policy and would therefore render such contract null and void. That insofar as any of the language of the application for letter of credit (Exhibit 4) purports to absolve the bank from liability for its own negligence, and particularly from liability for failure to obtain the very document which by purchasing the letter of credit the plaintiff employed the bank to obtain, or to limit such liability, it was and is against public policy and therefore null and void.

X.

That if defendant bank had not breached its contract and paid the \$214,000.00 to Dulien plaintiff

would not have been damaged as the result of receiving bad wire from Dulien, and for that reason the equity is greater in favor of plaintiff being made whole by the full collection of the amount of his net damages against Dulien and the judgment therefor before defendant bank has the right of restitution by way of judgment over against Dulien. That therefore plaintiff is entitled to be made whole by the collection of the full amount of the judgment herein granted him against defendants Dulien before defendant bank be permitted to execute upon or in any other manner proceed against the assets of defendants Dulien.

That by reason of the fact that Dulien accepted payment of \$214,000.00 under a letter of credit with whose terms it knew it was not complying and could not comply and by further reason of the fact that Dulien at the time of accepting payment knew it could not [308] comply with the contract between plaintiff and Dulien, defendant bank is entitled to judgment over against defendants Dulien for such sums of money as defendant bank may pay to plaintiff hereunder, but will be entitled to execute on said judgment over only in the event and after plaintiff shall have been paid by defendants Dulien and defendant bank together sums of money aggregating the full amount of his judgment against defendants Dulien with interest thereon to the date of full payment thereof.

XI.

That plaintiff is not entitled to any relief whatsoever upon its claim against Matson Navigation

Company, and Matson is entitled to a judgment of dismissal on the merits against plaintiff, but should pay its own costs.

XII.

That Section 22 of the Pomerene Act (Title 46 USCA Sec. 102) imposed an obligation on the United States of America as owner of the S.S. White Squall and as the carrier and on Matson as its berth agent, to insert exceptions in bill of lading LA 29, noting the apparent rusty condition of the wire covered thereby, but Matson was excused and relieved from the performance of said duty by the acts and conduct of defendants Dulien. That because neither the plaintiff nor the bank received or relied upon bill of lading LA 29 or gave value in good faith relying upon the description of the barbed wire contained in said bill of lading LA 29 neither of them was damaged by reason of the failure of Matson and its said principals to note exceptions therein, and therefore neither plaintiff nor the bank is entitled to any relief as against Matson Navigation Company. That any right of the plaintiff to recover from defendants Matson and the United States of America, or either of them, for failure to note exceptions in said bill of lading LA 29 was subject to the equities which existed between the parties to the said bill of lading, that is, defendants [309] Dulien, the shipper, on the one hand and defendant Matson and Respondent United States of America on the other. That such equities preponderate in favor of the defendant Matson and Respondent United States of America and against defendants

Dulien and thus against plaintiff. That Matson at all times herein concerned was acting solely as an agent of the United States of America and all parties to this action were at all times charged with notice thereof.

XIII.

That the claim of defendant and cross-complainant Matson Navigation Company set up in its cross-complaint against defendants Dulien is a claim contingent upon the recovery of judgment by plaintiff against Matson; and recovery being herein denied to plaintiff as against Matson, Matson is not entitled to any relief against Dulien. However, if upon appeal judgment should be ordered in favor of plaintiff and against Matson, then and in that event Matson shall be entitled upon satisfaction thereof to judgment over against Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., on Matson's cross-complaint against defendants Dulien in an amount equal to the amount so recovered by plaintiff against Matson, subject to the same conditions as are set forth in the bank's judgment over against Dulien, as set forth in paragraph X of these conclusions.

XIV.

That defendant and cross-complainant Citizens National Trust & Savings Bank of Los Angeles is not entitled to any relief against defendant and cross-defendant Matson Navigation Company.

XV.

That except as hereinafter stated plaintiff is en-

titled to collect under the judgments herein granted him the full sum of \$120,312.88 as of the date hereof viz. Nov. 16, 1950, plus costs, and interest to the date of payment thereof, from the defendant bank independent of and without regard to his right to collect from [310] defendants Dulien the amount of his judgment against defendants Dulien; and except as hereinafter stated plaintiff is entitled to collect the full sum of \$236,355.51 as of the date hereof, viz. Nov. 16, 1950, plus costs, and interest thereon to the date of payment thereof, from defendants Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, independent of and without regard to his right to collect from defendant bank the amount of his judgment against defendant bank; and until he has collected from said defendants Dulien and the defendant bank or from said defendants Dulien alone the full sum of \$236,355.51 as of the date hereof viz. Nov. 16, 1950, plus costs, and interest to the date of full payment thereof, the fact that he has a judgment against each of said defendants shall not, except as hereinafter stated, be a bar to his collection from the other of them of any balance which may be due on the judgment against such other; but plaintiff is not entitled in any event to collect on the judgments herein granted to him against defendants Dulien and defendant bank any more in the aggregate than a sum equal to the full amount of the larger of the said judgments, to wit, \$236,355.51 as of the date hereof viz. Nov. 16, 1950, the amount of the judgment against de-

fendants Dulien, plus costs, with interest thereon to the date of full payment thereof.

XVI.

That if, after having been otherwise made whole as to everything to which plaintiff is entitled from defendants Dulien except a sum equal to the balance remaining unpaid on his note to defendant bank, to wit, except \$17,181.35 plus interest on said note, plaintiff collects from defendants Dulien all or any portion of said last \$17,181.35 principal of the amount of said \$236,355.51 judgment against defendants Dulien, then and then only will the bank be entitled to any reimbursement from plaintiff on account of said note for any of plaintiff's actual recovery from defendants Dulien; but upon the collection by plaintiff of all or any portion of said last \$17,181.35 principal of his said \$236,355.51 judgment against defendants Dulien the bank shall be entitled to be forthwith reimbursed by plaintiff to the extent of such collection, together with such interest thereon, up to but not to exceed 5% per annum, as plaintiff may collect thereon from defendants Dulien.

Let Judgment Be Entered Accordingly.

Dated Nov. 16, 1950.

/s/ PEIRSON M. HALL,
Judge. [311]

PLAINTIFF'S COMPUTATION OF INTEREST ON JUDGMENT

1. Against Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation :

Principal amount of judgment as announced by the Court on June 16, 1950, and as found in paragraph XXXVII of the Findings of Fact.....\$181,699.37

Interest thereon at 7% per annum from July 29, 1946, to and including Nov. 15, 1950 (4 yrs., 3 months, and 16 days)

@ \$12,718.95 per year

1,059.91 per month and

35.33 per day 54,620.81

Total principal and interest to and including
Nov. 15, 1950\$236,320.18

If the judgment be signed after November 15, 1950, the interest will be increased in the amount of \$35.33 per day.

2. Against Citizens National Trust & Savings Bank :

Principal amount of judgment as announced
by the Court June 16, 1950.....\$105,699.37

Interest thereon at 7% per annum from July 29, 1946, to and including Nov. 15, 1950 (4 yrs., 3 months, 16 days)

@ \$7,398.95 per year

616.57 per month and

20.55 per day 31,774.31

Total principal and interest due plaintiff as of
Nov. 15, 1950, before credit for counterclaim on
plaintiff's note\$137,473.68

Deduct Bank's Counterclaim :

Principal on plaintiff's note held by bank as
erroneously reported to court at time judgment
was ordered\$14,609.10

Less error caused by inclusion in
note of disallowed \$535.00 letter of
credit service charge 535.00

Corrected principal balance.....\$14,074.10

Interest on note held by bank as
erroneously reported at time judgment
was ordered\$2,915.73

Less error by inclusion
of interest on the \$535.00
service charge 103.63

Corrected interest on note as of	
June 15, 1950	2,812.10
Additional interest to Nov. 15 @	
\$58.64 per month	293.20

Total credit on counterclaim as of	
November 15, 1950	17,179.40

Amount of judgment against bank 11-15-50.....\$120,294.28

If judgment is not signed until after November 15, 1950, then there should be added to the above stated Nov. 15, 1950, judgment figure the sum of \$18.60 per day for each additional day, arrived at as follows:

Difference between:	
7% on \$105,699.37 per day.....	\$20.55
and 5% on \$14,074.10 per day.....	1.95
Net daily increase in plaintiff's favor.....	<u>\$18.60</u>

[Endorsed]: Filed November 16, 1950.

[As corrected by order of District Court dated July 5, 1951.] [314]

In the District Court of the United States, Southern
District of California, Central Division

No. 7358-PH

J. B. LONDONO,

Plaintiff,

vs.

DULIEN STEEL PRODUCTS, INC., OF CALI-
FORNIA, a Corporation; DULIEN STEEL
PRODUCTS, INC., a Corporation; CITI-
ZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES, a National Bank-
ing Association, and MATSON NAVIGA-
TION COMPANY, a Corporation,

Defendants.

JUDGMENT*

This cause coming on regularly for trial the 18th day of April, 1950, before the above-entitled court, the Honorable Peirson M. Hall, Judge, presiding, in consolidation for trial with Suit in Admiralty No. 8482-PH entitled J. B. Londono, Libelant, vs. United States of America, United States Maritime Commission and War Shipping Administration, Respondents, before the Court without a jury, a jury having been specifically waived by all the parties

EDMUND S. SMITH,
Clerk.

By /s/ C. A. SIMMONS,
Deputy Clerk.

*[In margin]: Amended nunc pro tunc as of 11/16/50, by order filed 11/28/50, and entered 11/29/50 in JBk 69/399.

hereto; Thomas S. Bunn, appearing as counsel for plaintiff and cross-defendant, J. B. Londono, and for libellant, J. B. Londono; Joseph H. Dasteel, appearing as counsel for defendants, cross-complainants and cross-defendants, Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, hereinafter collectively referred [315] to as Dulien; Cosgrove, Cramer, Diether & Rindge, by Leonard A. Diether and Jesse R. O'Malley, appearing as counsel for defendant and cross-complainant Citizens National Trust & Savings Bank of Los Angeles, hereinafter referred to as the Bank; Brobeck, Phleger & Harrison, by Alan W. Aldwell, and Morrow & Trippet, by Hubert T. Morrow, John C. Morrow and Thomas F. Hetherington, appearing as counsel for defendant and cross-complainant Matson Navigation Company, hereinafter referred to as Matson; and Ernest A. Tolin, United States Attorney, by Bernard B. Laven, Assistant United States Attorney, appearing as counsel for respondents, United States of America, United States Maritime Commission and War Shipping Administration, in consolidated Suit in Admiralty No. 8482-PH; Answers having been filed by all defendants and respondents; cross-complaints having been filed by the bank against plaintiff, Dulien and Matson and by Matson against Dulien, all of said cross-complaints being by stipulation deemed denied by the respective cross-defendants; the bank's original answer having been prior to the trial by permission of the Court amended by its First and Second Amendments, and

the plaintiff during the course of the trial being permitted to amend his complaint by his First and Second Amendments thereto, filed herein on May 31, 1950, and June 14, 1950, respectively, and all references herein to the said complaint and said answer of the bank being to said complaint and said answer as amended; the trial having continued from day to day to and including June 16, 1950, and oral and documentary evidence having been introduced on behalf of all parties hereto; and the Court having announced its decision from the bench on June 16, 1950, and having directed the preparation of Findings of Fact, Conclusions of Law and Judgment herein; and plaintiff having thereafter on the 21st day of July, 1950, originally submitted proposed Findings of Fact, Conclusions of Law and Judgment, to which written objections were filed by the several defendants, and a three day hearing, upon due notice to all parties, having [316] been held by the Court upon said objections on September 28th, 29th and 30th, 1950, at which hearing all parties were represented; and the plaintiff having thereafter re-submitted Findings of Fact, Conclusions of Law and Judgment in accordance with direction of the Court at the conclusion of said hearings, to which objections were filed and on which objections another duly noticed hearing was held by the Court on November 2nd, 1950, at which hearing all parties were represented; and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law and having directed that judgment be entered in accordance therewith,

Now, Therefore, by reason of the law and the findings aforesaid, [317]

It Is Ordered, Adjudged and Decreed:

I.

That plaintiff have judgment for damages against defendants Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, and each of them, in the sum of \$236,355.51 together with his costs herein incurred in the amount of \$755.10, and interest thereon at the rate of 7% per annum until paid.

II.

That plaintiff have judgment for damages against defendant Citizens National Trust & Savings Bank of Los Angeles in the sum of \$120,312.88 together with his costs incurred herein in the amount of \$747.05, and interest thereon at the rate of 7% per annum until paid.

III.

That plaintiff is not entitled to any relief against defendant, Matson Navigation Company; plaintiff shall take nothing against defendant, Matson Navigation Company, on his action herein and said action shall be and the same hereby is dismissed on the merits as to said defendant, and defendant, Matson Navigation Company shall pay its own costs.

IV.

That except as hereinafter conditionally provided defendant and cross-complainant, Citizens National

Trust & Savings Bank of Los Angeles, is not entitled to any relief against plaintiff and cross-defendant, J. B. Londono.

V.

That defendant and cross-complainant, Citizens National Trust & Savings Bank of Los Angeles, is not entitled to any relief against defendant and cross-defendant, Matson Navigation Company and shall take nothing on its cross-complaint against defendant and cross-defendant, Matson Navigation Company herein; said cross-complaint shall be and the same hereby is dismissed on the merits. [318]

VI.

That plaintiff's action against defendant, Matson Navigation Company, and the cross-complaint of defendant and cross-complainant, Citizens National Trust & Savings Bank of Los Angeles, against defendant and cross-defendant, Matson Navigation Company, having been dismissed on the merits, defendant and cross-complainant, Matson Navigation Company, is not entitled to any relief on its cross-complaint against defendants, Dulien Steel Products, Inc., of California, a California corporation, or Dulien Steel Products, Inc., a Washington corporation.

VII.

That the claim of defendant and cross-complainant, Matson Navigation Company set up in its cross-complaint against defendants, Dulien, is a claim contingent upon the recovery of judgment by plaintiff against Matson Navigation Company, and re-

covery being herein denied to plaintiff as against Matson, Matson is not entitled to any relief against defendants, Dulien. However, if upon appeal judgment should be ordered in favor of plaintiff and against Matson then and in that event Matson Navigation Company shall be entitled to judgment over against Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, on Matson's cross-complaint against defendants, Dulien, in an amount equal to the amount so recovered by plaintiff against Matson Navigation Company.

VIII.

That all sums of money paid by the defendant, Citizens National Trust & Savings Bank of Los Angeles shall be credited only upon the judgment herein ordered against said defendant bank. That all sums of money paid by defendants, Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, or either of them, shall be credited only upon the judgment herein ordered [319] against said defendants, Dulien. That after plaintiff shall have collected hereunder from said defendants, Dulien, and said defendant bank sums aggregating and equal to the amount of the judgment herein against said defendants, Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products Inc., a Washington corporation, and interest thereon up to the date of full payment thereof, then and then only shall defendant, Citizens National

Trust & Savings Bank of Los Angeles have, and said defendant bank is in that event hereby given, judgment over against said defendants, Dulien, for such amounts of money as said defendant bank shall have paid to plaintiff upon plaintiff's judgment against said defendant bank; but until that time said defendant bank shall not be entitled to levy execution upon, or in any other manner proceed against, the assets of said defendants, Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, or either of them, for the purpose of collecting upon this judgment over.

IX.

That, except as hereinafter stated, plaintiff is entitled to collect hereunder the full sum of \$120,-312.88 plus costs, with interest thereon as herein above set forth from the defendant, Citizens National Trust & Savings Bank of Los Angeles, independent of and without regard to his right to collect from defendants, Dulien, the amount of his judgment against defendants, Dulien; and, except as hereinafter stated, plaintiff is entitled to collect the full sum of \$236,355.51, plus costs, with interest thereon as herein above set forth from defendants, Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, independent of and without regard to his right to collect from defendant bank the amount of his judgment against said defendant bank; and until he has collected from said

defendants, Dulien and the defendant bank or from said defendants, Dulien, alone the full sum of \$236,355.51, plus costs, [320] with interest to the date of full payment thereof, the fact that he has a judgment against each of said defendants shall not, except as hereinafter stated, be a bar to his collection from the other of them of any balance which may be due on the judgment against such other; but plaintiff is not entitled to collect in any event on the judgments herein granted him against defendants, Dulien, and defendant bank any more in the aggregate than a sum equal to the full amount of the larger of the said judgments, to wit, \$236,355.51 the amount of the judgment against defendants, Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, plus costs, with interest thereon to the date of full payment thereof; and when plaintiff shall have received such payment in full by whomsoever or whichever of said defendants paid, plaintiff's rights hereunder shall cease and terminate and insofar as plaintiff is concerned this judgment shall be fully satisfied.

X.

That if, after having been otherwise made whole as to everything to which plaintiff is entitled from defendants, Dulien, except a sum equal to the balance remaining unpaid on his note to defendant bank, to wit, except \$17,181.35 principal plus interest on said note, plaintiff collects from defendants, Dulien, all or any portion of said last \$17,181.35 principal of the amount of said \$236,355.51 judgment against

defendants, Dulien, then and then only shall the bank be entitled to any reimbursement from plaintiff on account of said note for any of plaintiff's actual recovery from defendants, Dulien; but upon the collection by plaintiff of all or any portion of said last \$17,181.35 principal of his \$236,355.51 judgment against defendants, Dulien, the Citizens National Trust & Savings Bank of Los Angeles shall be forthwith reimbursed by plaintiff to the extent of such collection, together with such interest thereon, up to but not to exceed 5% per annum, as plaintiff may collect thereon from defendants, Dulien.

Dated November 16th, 1950.

/s/ PEIRSON M. HALL,
Judge. [321]

[Endorsed]: Filed November 16, 1950.

Judgment entered Nov. 17, 1950.

As corrected by order of District Court dated July 5, 1951. [324]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS, MAKE
ADDITIONAL FINDINGS AND CONCLU-
SIONS OF LAW AND AMEND JUDGMENT
ACCORDINGLY

Comes Now the plaintiff and moves the above-entitled court for an order amending the Findings of Fact, Conclusions of Law and Judgment hereto-

fore entered herein within ten days immediately prior to the date hereof, to wit, on November 17th, 1950, in Book 69, Page 248 of Judgments, as follows:

1. To add to paragraph II of the Conclusions of Law on page 47, the following separate unnumbered paragraph:

“That said acts of Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, and each of them, set forth in the foregoing Findings of Fact, and particularly in paragraphs V, XXXVII [325] and XLV thereof, were and constituted a fraud upon plaintiff herein.”

This motion is based upon the pleadings, papers, records and filed in this action, upon Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, and particularly upon the fact that in paragraph XLV of the Findings of Fact all the elements of fraud are found but there was no specific Conclusion of Law made by the Court on said matter of fraud as such, and upon notice served concurrently herewith.

Dated this 27th day of November, 1950.

/s/ THOMAS S. BUNN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 27, 1950. [326]

[Title of District Court and Cause.]

ORDER CORRECTING JUDGMENT NUNC
PRO TUNC ON THE COURT'S OWN
MOTION

On hearing of motion for stay of execution and to fix the amount of the supersedeas bonds, it was called to the Court's attention that through oversight there was omitted from the judgment the conditions of a contingent judgment-over against defendants Dulien in favor of Matson Navigation Company, as set forth in the Conclusions of Law in paragraph XIII of such conclusions.

Now, on the Court's own motion, it is hereby ordered that such omission be and is hereby corrected nunc pro tunc as of November 16, 1950, by striking the period at the end of paragraph VII of said judgment and inserting a comma in place and instead of such period and by inserting after said comma the following language, viz.: [327]

“subject to the same conditions as are set forth in the bank's judgment-over against defendants Dulien as set forth in paragraph VIII hereof.”

and by inserting in paragraph VII, page 4, line 20 of the Judgment the words “upon satisfaction thereof” between the word “shall” and the word “be,” so that paragraph VII of said judgment in its entirety reads as follows, viz.:

“That the claim of defendant and cross-complainant, Matson Navigation Company, set up in its cross-complaint against defendants,

Dulien, is a claim contingent upon the recovery of judgment by plaintiff against Matson Navigation Company, and recovery being herein denied to plaintiff as against Matson, Matson is not entitled to any relief against defendants, Dulien. However, if upon appeal judgment should be ordered in favor of plaintiff and against Matson then and in that event Matson Navigation Company shall upon satisfaction thereof be entitled to judgment over against Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, on Matson's cross-complaint against defendants, Dulien, in an amount equal to the amount so recovered by plaintiff against Matson Navigation Company, subject to the same conditions as are set forth in the bank's judgment-over against defendants, Dulien, as set forth in paragraph VIII hereof."

The Clerk is hereby ordered and directed to enter the above correction of judgment nunc pro tunc as of the date of entry of the judgment herein, to wit, November 17, 1950.

Dated November 28, 1950.

/s/ PEIRSON M. HALL,
Judge.

Receipt of copy acknowledged.

Order entered Nov. 29, 1950.

[Endorsed]: Filed November 28, 1950. [328]

[Title of District Court and Cause.]

ORDER AMENDING FINDINGS OF FACT
AND CONCLUSIONS OF LAW NUNC PRO
TUNC ON PLAINTIFF'S MOTION

On motion of plaintiff, by Thomas S. Bunn, his attorney, duly made before this Court within the time allowed by law and the Federal Rules of Civil Procedure applicable to such cases, to wit, on Monday, the 27th day of November, 1950, and coming on regularly for hearing this 7th day of December, 1950, at the hour of 10:00 o'clock a.m., Hon. Peirson M. Hall, Judge, presiding, all parties being present or having been duly notified of the time and place of hearing,

It Is Hereby Ordered that the findings of fact and conclusions of law heretofore signed and filed herein on November 16, 1950, and entered herein on November 17, 1950, are hereby amended nunc pro tunc as of November 16, 1950, by adding to paragraph II [332] of the conclusions of law on page 47 the following separate unnumbered paragraph:

“That said acts of Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington Corporation, and each of them, set forth in the foregoing findings of fact and particularly paragraphs V, XXXVII and XLV thereof were and constituted a fraud upon plaintiff herein.”

The Clerk is hereby ordered and directed to enter the above amendment of findings of fact and con-

clusions of law nunc pro tunc as of the date of entry of judgment herein, to wit, November 17, 1950.

Dated this 7th day of December, 1950.

/s/ PEIRSON M. HALL,
Judge.

Receipt of copy acknowledged.

Order entered Dec. 7, 1950.

[Endorsed]: Filed December 7, 1950. [333]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF THE DEFENDANT
AND CROSS-COMPLAINANT, CITIZENS
NATIONAL TRUST & SAVINGS BANK OF
LOS ANGELES TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT UNDER RULE 73(b)

Notice is hereby given that the defendant and cross-complainant Citizens National Trust & Savings Bank of Los Angeles, one of the defendants above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the following portions of the Final Judgment entered in this action on November 17, 1950, to wit:

1. All of Paragraph II of said judgment wherein judgment in the sum of \$120,312.88, together with costs and interest, is rendered in favor of plaintiff and against said bank.

2. All of Paragraph IV of said judgment wherein it is adjudged that defendant and cross-complainant Bank is not entitled [337] to any relief against plaintiff and cross-defendant.

3. That part of Paragraph VIII of said judgment reading as follows:

“That all sums of money paid by defendants Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, or either of them, shall be credited only upon the judgment herein ordered against said defendants Dulien.”

4. Those portions of Paragraph IX of said judgment reading as follows:

“That, except as hereinafter stated, plaintiff is entitled to collect hereunder the full sum of \$120,312.88 plus costs, with interest thereon as herein above set forth from the defendant Citizens National Trust & Savings Bank of Los Angeles independent of and without regard to his right to collect from defendants Dulien the amount of his judgment against defendants Dulien;”

“* * * and until he [plaintiff] has collected from said defendants Dulien and the defendant bank or from said defendants Dulien alone the full sum of \$236,355.51, plus costs, with interest to the date of full payment thereof, the fact that he has a judgment against each of said

defendants shall not, except as hereinafter stated, be a bar to his collection from the other [338] of them of any balance which may be due on the judgment against such other;”.

Dated December 12, 1950.

COSGROVE, CRAMER,
DIETHER & RINDGE,

By /s/ LEONARD A. DIETHER,
Attorneys for Defendant and Cross-Complainant,
Citizens National Trust & Savings Bank of Los
Angeles.

[Endorsed]: Filed December 12, 1950. [339]

[Title of District Court and Cause.]

NOTICE OF APPEAL BY DULIEN STEEL
PRODUCTS, INC., OF CALIFORNIA, A
CALIFORNIA CORPORATION, AND DU-
LIEN STEEL PRODUCTS, INC., A WASH-
INGTON CORPORATION

Notice Is Hereby Given that Dulien Steel Prod-
ucts, Inc., of California, a California corporation,
and Dulien Steel Products, Inc., a Washington cor-
poration, defendants and parties above named, and
each of them, hereby appeal to the Circuit Court of
Appeals for the Ninth Circuit, from the final judg-
ment entered in this action on November 17, 1950, as

amended by orders entered November 29, 1950, and December 7, 1950.

Dated this 11th day of December, 1950.

/s/ JOSEPH H. DASTEEL,

PRESTON, THORGRIMSON &
HOROWITZ,

By /s/ CHARLES HOROWITZ,

Attorneys for Said
Defendants.

[Endorsed]: Filed December 12, 1950. [340]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Dulien Steel Products, Inc., of California, a corporation, and Dulien Steel Products, Inc., a corporation, hereby designate the following requirements for their record on appeal under Rule 75 of Rules of Procedure:

1. All evidence and proceedings at the trial which were stenographically reported including the opening statements of counsel, the judge's remarks and decision at the close of the trial and the judge's remarks and decision on September 28, 1950, with respect to the said defendant Bank's cross-complaint against Dulien, but excepting all proceedings for the settlement of the Findings of Fact and Con-

clusions of Law and the [345] form of judgment, except that portion thereof with respect to Dulien's motion to strike a proposed finding of fraud contained in plaintiff's proposed Conclusions of Law, the judge's remarks and decision [346] thereon having taken place on the 29th day of September, 1950, and the judge's remarks and decision on plaintiff's motion to amend Conclusions having taken place on the 7th day of Dec., 1950.

1. A Complaint. Filed July 17, 1947.
2. Amendment to complaint (to third cause of action against defendant, Matson Navigation Company). Filed May 31, 1950.
3. Second Amendment to Complaint. Filed June 14, 1950.
4. Motions by defendant Citizens National Trust & Savings Bank of Los Angeles (1) to dismiss the action; and (2) for a more definite statement or for a Bill of Particulars. Filed Aug. 15, 1947.
5. Plaintiff's Bill of Particulars (furnished pursuant to defendant Bank's motion). Filed Dec. 30, 1947.
6. Answer of Dulien Steel Products, Inc., of California, a corporation, and Dulien Steel Products, Inc., a corporation. Filed Aug. 22, 1947.
7. Answer of defendant Citizen National Trust & Savings Bank of Los Angeles. Filed Jan. 28, 1948.
8. Amendment to answer of defendant Citizens

National Trust & Savings Bank of Los Angeles.
Filed Jan. 16, 1950.

9. Second amendment to answer of defendant, Citizens National Trust & Savings Bank of Los Angeles. Filed Apr. 18, 1950.

10. Cross-complaint of Citizens National Trust & Savings Bank of Los Angeles. Filed Feb. 8, 1949.

11. Stipulation between defendant and cross-complainant, Citizens National Trust and Savings Bank of Los Angeles, and defendants and cross-defendants, Dulien Steel Products, Inc., of [347] California, and Dulien Steel Products, Inc., (that the allegation of the cross-complaint shall be deemed denied without necessity of filing a formal answer to cross-complaint). Filed Feb. 18, 1949.

12. Stipulation between defendant and cross-complainant, Citizens National Trust & Savings Bank of Los Angeles, and defendant and cross-defendant, Matson Navigation Company (that the allegations of cross-complaint of Bank shall be deemed denied without necessity of filing a formal answer). Filed Feb. 28, 1949.

13. Stipulation between J. B. Londono, plaintiff and cross-defendant, and Citizens National Trust & Savings Bank of Los Angeles, cross-complainant (that the allegations of cross-complaint may be deemed denied without necessity of formal answer). Filed Mar. 14, 1949.

14. Motion to strike testimony of plaintiff's witnesses (interposed by defendants, Dulien Steel

Products, Inc., of California, and Dulien Steel Products, Inc.). Filed May 25, 1950.

15. Answer of defendant, Matson Navigation Company. Filed Sept. 15, 1948.

16. Plaintiff's reply to counterclaim of defendant, Citizens National Trust & Savings Bank of Los Angeles. Filed Feb. 19, 1948.

17. Interrogatories of the defendant, Citizens National Trust & Savings Bank of Los Angeles directed to plaintiff, J. B. Londono. Filed Oct. 14, 1947.

18. Plaintiff's answers to defendant Bank's interrogatories. Matson offered in evidence 6, 20, 21. Defendant Bank offered in evidence 1, 3, 4, [348] 8, 9. Filed Dec. 30, 1947.

19. Interrogatories by cross-complainant, Citizens National Trust & Savings Bank of Los Angeles requested of Matson Navigation Company. Filed Dec. 13, 1949.

20. Answers to interrogatories (by Matson to Bank's interrogatories). Filed Jan. 30, 1950.

21. Interrogatories of plaintiff directed to defendant, Matson Navigation Company. Filed Mar. 7, 1950.

22. Answers of Matson Navigation Company to interrogatories of plaintiff. Filed Mar. 30, 1950.

23. Notice of Motion for Order permitting defendants Dulien Steel Products, Inc., of California

and Dulien Steel Products, Inc., to file cross-complaint against Matson Navigation Company, Affidavit and proposed cross-complaint. Filed May 24, 1950.

24. Substitution of Attorneys (for Matson Navigation Company). Filed July 20, 1948.

25. Pretrial statement and points and authorities of plaintiff and libelant, J. B. Londono. Filed Feb. 13, 1950.

26. Motion to Dismiss and for non-suit; points and authorities (interposed by defendants, Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc.). Filed May 23, 1950.

27. Findings of Fact and Conclusions of Law. Filed Nov. 16, 1950.

28. Plaintiff's motion to Amend Findings and make additional Findings and Conclusions of Law and amend Judgment accordingly. Filed Nov. 30, 1950.

29. Judgment. Filed Nov. 17, 1950.

30. Order amending Judgment Nunc Pro Tunc. Filed Nov. 27, 1950.

31. Order on plaintiff's motion to amend Findings and Conclusions of Law and amend Judgment accordingly. Filed Nov. 30, 1950. [349]

32. All exhibits received in evidence and all exhibits marked for identification, only. Defendants Dulien intend to and will make a motion to the

U. S. Court of Appeals, Ninth Circuit, requesting that all original exhibits and exhibits marked for identification only be transmitted to the Appellate Court for its use on appeal and that none of the documentary exhibits will be published in the record. Defendants Dulien request that Exhibits 51, 52, 54 and 63, each of which is a one hundred pound roll of barbed wire, be retained in the Clerk's office, U. S. District Court, in Los Angeles, until such time as the U. S. Court of Appeals, Ninth Circuit, desires said exhibits to be sent to the Clerk of the U. S. Court of Appeals.

33. Document prepared by counsel for plaintiff consisting of two pages, entitled "Estimates of Damages—Londono" submitted to the Court by counsel for plaintiff at the time of the final argument on June 16, 1950.

34. Notice of Appeal of defendants Dulien.

35. Supersedeas and Cost Bonds on Appeal of defendants Dulien.

36. Designation of Contents of Record on Appeal by defendants Dulien.

Appellants Dulien request that the record on appeal include each and all of the foregoing. However, insofar as the items hereinabove contained are already included in the contents of the record on appeal by Citizens National Trust & Savings Bank of Los Angeles, [350] there is no request that the items so included be duplicated by this designation. It is intended that the contents of record on appeal

shall include all of the items designated by any appellant, but without duplication.

/s/ JOSEPH H. DASTEEL.

PRESTON, THORGRIMSON &
HOROWITZ,

By /s/ CHARLES HOROWITZ,
Attorneys for Appellants.

[Endorsed]: Filed December 12, 1950. [351]

[Title of District Court and Cause.]

DESIGNATION BY APPELLEE, J. B. LON-
DONO, OF PORTIONS OF THE RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN THE RECORD ON AP-
PEAL PURSUANT TO RULE 75(a)

Appellee, J. B. Londono the plaintiff in the above-entitled action, hereby designates the following additional portions of the record, proceedings and evidence to be included in the record on appeal pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, being those portions required by him in addition to those heretofore designated by the appellants Dulien Steel Products, Inc., of California, a corporation; Dulien Steel Products, Inc., a corporation, and Citizens National Trust and Savings Bank of Los Angeles: [361]

1. Summons and return of service of Writ show-

ing service on Dulien Steel Products. Inc. Filed Aug. 25, 1947.

2. Stipulation joined in by defendants Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., waiving answer to Matson Navigation Company's Cross-Complaint. Filed Feb. 13, 1950.

3. Pretrial memorandum of Dulien Steel Products, Inc., of California. Filed Feb. 13, 1950.

4. Notice of Motion for order permitting defendants Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., to file Cross-Complaint against Matson Navigation Company, and Affidavit of Joseph H. Dasteel served and filed therewith. Filed May 24, 1950.

5. (Proposed) Cross-Complaint of Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc. Lodged May 24, 1950.

6. Substitution of attorneys for Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., (adding Henry S. Dottenheim). Filed July 11, 1950.

7. Judge's remarks and decision at hearing on 12-7-50 on plaintiff's motion to Amend Conclusions of Law. (This additional designation is made by plaintiff because of the uncertainty from defendants' Dulien's language on lines 1 to 4, inclusive, page 2, of their "Designation of Contents of [362] Record on Appeal" as to whether or not they have

designated the Judge's said remarks of Dec. 7, 1950.)

8. Deposition of John E. Porter. Filed April 8, 1950.

9. Depositions of Albert B. Carter, Musuo Hirata, Henry W. C. Lum, George W. H. Lum and Kenneth T. S. Kam. Filed April 8, 1950.

10. Libel in Personam in admiralty suit No. 8482-PH entitled J. B. Londono, Libelant, vs. United States of America, United States Maritime Commission and the War Shipping Administration, Respondents. Filed July 26, 1948.

11. Answer of the Respondents in admiralty suit No. 8482-PH. Filed April 26, 1949.

12. Amendment to Libel in Personam in admiralty suit No. 8482-PH. Filed May 26, 1950.

13. Designation by Appellee, J. B. Londono, of Portions of the Record, Proceedings and Evidence to Be Contained in the Record on Appeal Pursuant to Rule 75(a). Filed Dec. 22, 1950.

14. Appellee respectfully reserves the right by subsequent designation supplemental hereto to designate herein the Findings of Fact, Conclusions of Law and Judgment in admiralty suit No. 8482-PH (not yet signed and filed), if after they are signed and filed he is advised so to do, and any other proceedings in said admiralty suit occurring subsequent hereto. [363]

Any portion of the record, proceedings or evi-

dence herein designated to be contained in the record on appeal which has already been designated by any other party to the appeal herein shall not be duplicated in said record on appeal, but the items herein designated, as additional matter, shall constitute a part of a single record on appeal to be prepared in accordance with Rule 75(k) of the Rules on Appeal.

Dated December 21st, 1950.

/s/ THOMAS S. BUNN,
Attorney for Appellee,
J. B. Londono.

Affidavit of Service by Mail attached.

Receipt of copy acknowledged.

[Endorsed]: Filed December 22, 1950. [364]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Defendant Matson Navigation Company, a corporation, hereby substitutes the law firms of Brobeck, Phleger & Harrison and Morrow & Morrow as their attorneys of record in place of the law firms of

Brobeck, Phleger & Harrison and Morrow & Trippet.

Dated December 31, 1950.

MATSON NAVIGATION COMPANY,

A Corporation, Defendant,

By /s/ [INDISTINGUISHABLE]

Its Secretary.

We hereby consent to the above substitution.

Dated December 31, 1950.

BROBECK, PHLEGER &
HARRISON,

By /s/ GREGORY A. HARRISON,

MORROW & TRIPPET,

By /s/ JOHN C. MORROW,

Attorneys for Said Defendant.

We hereby accept the above substitution.

Dated December 31, 1950.

BROBECK, PHLEGER &
HARRISON,

By /s/ GREGORY A. HARRISON,

MORROW & MORROW,

By /s/ JOHN C. MORROW.

Affidavid of Service by Mail Attached.

[Endorsed]: Filed January 11, 1951. [372]

[Title of District Court and Cause.]

ORDER CORRECTING ERRORS IN RE-
PORTER'S TRANSCRIPT OF PROCEED-
INGS AT TRIAL

On motion of plaintiff, by Thomas S. Bunn, his attorney, coming on regularly for hearing this 25th day of June, 1951, at the hour of 10:00 o'clock a.m., Honorable Peirson M. Hall, Judge presiding, all parties being present or having been duly notified of the time and place of hearing, and the court having examined the Clerk's copy of the Reporter's transcript of the proceedings at the trial of the above-entitled cause in each and every one of the portions of said transcript to the correction of which said motion is directed and having found that said transcript as filed herein and as heretofore transmitted to the Clerk of the United States Court of Appeals for the Ninth Circuit is in error in the respects hereinafter mentioned and corrected hereby. Now, Therefore, for the purpose of making the record conform to the truth in those respects,

It is Hereby Ordered under the provisions of F.R.C.P. 75(h) that the reporter's transcript of the testimony and other proceedings at the trial of the above-entitled case be and the same is hereby corrected in the following respects, this order is hereby directed to be transmitted to the said United States Court of Appeals for the Ninth Circuit, before which Court said cause is now on appeal, and the clerk of said Court is hereby authorized and requested by this Court to make such corrections by inter-

lineation in the original record and all copies thereof now in his custody, to wit:

Volume I.

P. 20, line 13—Add, after word “Londono,” the words “on that.”

P. 22, line 24—Change \$10,000.00 to \$10.00.

P. 26, line 17—Change “sale” [of lading] to “bill” [of lading].

P. 32, line 9—Change “had” to “was.”

P. 38, line 16—Change “our” to “out.”

P. 58, line 22—Change “sent” to “send.”

Volume II.

P. 129, line 23—Change “exactly” to “exact date.”

P. 133, line 5—Change “be accompanied by” to “accompany.”

Volume III.

P. 290, line 20—Change “complaint” to “complete.”

P. 333, line 17—Change “an” to “a ruling.”

Volume IV.

P. 383, line 19—After word “also” strike the comma and insert word “acting.”

Volume V.

P. 559, line 10—Change word “yes” to “no.”

Volume VI.

P. 719, line 11—Change “it” to “if.”

Volume IX.

P. 1078, line 15—Change “the witness” to “the court.”

Volume XI.

P. 1454, line 10—Change “the court” to “the witness.”

Volume XIII.

P. 1858, line 10—Change “134” to “734.”

Volume XIX.

P. 2776, line 8—Change “wasn’t” to “was.”

Volume XXVI.

P. 3855, line 19—Change “somebody” to “socio.”

Volume XXXI.

P. 4691, line 12—Change “instruction” to “construction.”

Dated June 25, 1951.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed U.S.D.C. June 25, 1951.

[Endorsed]: Filed U.S.C.A. June 29, 1951.

[Title of District Court and Cause.]

ORDER CORRECTING CLERICAL ERRORS
IN FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT NUNC PRO
TUNC

The motion of plaintiff, by Thomas S. Bunn, his attorney, for an order correcting clerical errors in the decision and judgment herein coming on regularly before this Court, the Honorable Peirson M.

Hall, Judge, presiding, on July 5th, 1951, at the hour of 10:00 o'clock, a.m., after due notice thereof given to all parties in accordance with an order of this Court shortening the time of service thereof; defendant Citizens National Trust & Savings Bank of Los Angeles being represented by its attorneys of record, Cosgrove, Cramer, Diether and Rindge, by Leonard A. Diether, Esq., and Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc., being represented by their attorney of record, Joseph H. Dasteel, Esq.; and all parties having had an opportunity to be heard thereon and it appearing to the Court that in spite of statements made by the Court in its oral opinion uttered at the close of the trial on June 16, 1950, to the effect that there must be no double recovery by plaintiff and in spite of extensive discussions in chambers between the Court and counsel for all parties to the same effect, nevertheless it apparently escaped the attention of all counsel and the court at the time the Findings, Conclusions and Judgment were finally settled that the judgment as finally worded might be interpreted as possibly permitting a double recovery by the plaintiff to the extent of the amount remaining unpaid on plaintiff's promissory note to the bank, in the event that plaintiff collected the full amount of this Judgment and cost from defendant Dulien only, and not from deft. bank whereas it was never the intention of the Court or counsel that such possibility be permitted; and it appearing that any possibility of such double recovery is altogether inconsistent with the other provisions of said decision

and judgment and resulted solely from clerical errors in the composition and drafting of said decision and judgment; and it further appearing that for said reasons this Court has the power to correct such clerical errors even now after the docketing of the appeal, and that the correction thereof will be in the interests of justice and equity, now therefore, the motion of plaintiff is hereby granted and under the provisions of Section 75(h) of the Federal Rules of Civil Procedure and under the power which is inherent in this Court to correct clerical errors in its own records so as to make said records speak the truth,

It Is Hereby Ordered that clerical errors in the findings of fact, conclusions of law and judgment herein be and they are hereby corrected nunc pro tunc as of November 16th, 1950, the date of said findings, conclusions and judgment, in the following manner, to wit:

1. By adding to the findings of fact, as a new paragraph thereof numbered L, the following paragraph:

“L.

“The difference between the \$236,355.51 to which plaintiff is entitled as against defendants Dulien and the \$17,181.35 balance now remaining unpaid to defendant bank on plaintiff's said promissory note of July 31, 1946, is \$219,174.16. In the calculation of the amount to which plaintiff is entitled as against defendant bank there has been deducted, as above

stated in Paragraph XL hereof, the amount now remaining unpaid on plaintiff's said note; but in the calculation of the amount to which plaintiff is entitled as against defendants Dulien no such deduction has been made because defendants Dulien are not entitled to any such credit; but if plaintiff collects from defendants Dulien the amount of said balance on his said note to the bank or any portion thereof after having been otherwise made whole as to everything to which he is entitled from defendants Dulien except the balance remaining unpaid on said note, to wit, except the last \$17,181.35 and interest on said note, then and then only will the bank be entitled to reimbursement by plaintiff on account of said note for any such actual recovery by plaintiff from defendants Dulien; and therefore the Court further finds that upon the collection by plaintiff of all or any portion of the last \$17,181.35 principal of said \$236,355.51 judgment against defendants Dulien the bank shall be entitled to be reimbursed by plaintiff to the extent of such collection, together with such interest thereon, up to but not exceeding 5% per annum, as plaintiff may collect thereon from defendants Dulien."

2. By adding to the conclusions of law, as a new paragraph thereof numbered XVI, the following:

“XVI.

“That if, after having been otherwise made whole as to everything to which plaintiff is entitled from defendants Dulien except a sum equal to the balance remaining unpaid on his note to defendant bank, to wit, except \$17,181.35 plus interest on said note, plaintiff collects from defendants Dulien all or any portion of said last \$17,181.35 principal of the amount of said \$236,355.51 judgment against defendants Dulien, then and then only will the bank be entitled to any reimbursement from plaintiff on account of said note for any of plaintiff’s actual recovery from defendants Dulien; but upon the collection by plaintiff of all or any portion of said last \$17,181.35 principal of his said \$236,355.51 judgment against defendants Dulien the bank shall be entitled to be forthwith reimbursed by plaintiff to the extent of such collection, together with such interest thereon, up to but not to exceed 5% per annum, as plaintiff may collect thereon from defendants Dulien.”

3. By adding to the judgment, as a new paragraph thereof numbered X, the following:

“X.

“That if, after having been otherwise made whole as to everything to which plaintiff is entitled from defendants Dulien except a sum equal to the balance remaining unpaid on his note to defendant bank, to wit, except \$17,181.35

principal plus interest on said note, plaintiff collects from defendants Dulien all or any portion of said last \$17,181.35 principal of the amount of said \$236,355.51 judgment against defendants Dulien, then and then only shall the bank be entitled to any reimbursement from plaintiff on account of said note for any of plaintiff's actual recovery from defendants Dulien; but upon the collection by plaintiff of all or any portion of said last \$17,181.35 principal of his \$236,355.51 judgment against defendants Dulien the Citizens National Trust & Savings Bank of Los Angeles shall be forthwith reimbursed by plaintiff to the extent of such collection, together with such interest thereon, up to but not to exceed 5% per annum, as plaintiff may collect thereon from defendants Dulien."

4. By inserting in the first line of paragraph IV of the judgment, on page 3 thereof, after the word "That," the following language, to wit: "except as hereinafter conditionally provided."

5. By inserting in the first line of paragraph VII of the conclusions of law, on page 49 thereof, after the word "That," the following language, to wit: "except as hereinafter conditionally provided."

And It Is Hereby Further Ordered that this original order be forthwith transmitted by the Clerk of this Court to the Court of Appeals of the United

States for the Ninth Circuit, at San Francisco, California.

Dated: July 5th, 1951.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed U.S.D.C. July 5, 1951.

[Endorsed]: Filed U.S.C.A. July 9, 1951.

[Title of District Court and Cause.]

NOTICE OF ORDER CORRECTING CLERICAL
ERRORS IN FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDG-
MENT NUNC PRO TUNC

To: Dulien Steel Products, Inc., of California, a California corporation, and Dulien Steel Products, Inc., a Washington corporation, and to Joseph H. Dasteel, Their Attorney; and to Defendant Citizens National Trust & Savings Bank of Los Angeles, and to Cosgrove, Cramer, Diether & Rindge, Its Attorneys:

You Will Please Take Notice that on July 5, 1951, the Honorable Peirson M. Hall, Judge of the above-entitled Court, signed, and there was filed herein, on the same day, the order of said Court correcting clerical errors in Findings of Fact, Conclusions of Law and Judgment herein, and directing that said order be forthwith by the Clerk of this Court transmitted to the United States Court

of Appeals for the Ninth Circuit, and that for your convenience a photostatic copy of said order is served upon each of you herewith.

Dated: July 5, 1951.

/s/ THOMAS S. BUNN,
Attorney for Plaintiff,
J. B. Londono.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 6, 1951.

[Title of District Court and Cause.]

LIBEL IN PERSONAM FOR DAMAGES FOR
ISSUANCE OF FALSE BILL OF LADING

To the Honorable Judges of the Above-Entitled
Court:

Libelant, J. B. Londono, files this his libel in a cause of contract, civil and maritime, against the United States of America, the United States Maritime Commission, and the War Shipping Administration, owners of the S.S. Sonoma, formerly the S.S. White Squall, and alleges as follows:

I.

That libelant is a citizen of and resides in the Republic of Colombia, South America, and has no place of business in the United States of America.

That under the law of the Republic of Colombia a citizen of the United States of America having

or claiming rights against the Republic of Colombia and its agencies identical with those herein claimed by libelant against the United States of America and [376] the other respondents named herein could sue in the courts of the Republic of Colombia and upon a proper showing recover against the said Republic and its agencies; and therefore libelant alleges that there exists between the United States of America and the Republic of Colombia the reciprocity necessary to enable this libelant to maintain this suit in admiralty in the above-entitled Court.

II.

That at all times herein mentioned the respondent United States of America was and still is a sovereign which has by law consented to be sued, and the respondents United States Maritime Commission and the War Shipping Administration, each having its principal office in Washington, D. C., were and still are agencies or instrumentalities of the respondent United States of America.

III.

(a) That this suit is brought under the Act of March 9, 1920, known as the "Suits in Admiralty Act" (41 Stat. 525; 46 U.S.C.A. 742).

(b) That at all times herein mentioned prior to September 1, 1946, the vessel S.S. White Squall was employed as a merchant vessel owned and operated by the respondents; that at some time after said date said vessel became known and is now known as the S.S. Sonoma; that said vessel is

now or during the currency of process herein will be within the Port of Los Angeles, California, and within the jurisdiction of this Honorable Court; and that said vessel will be hereinafter referred to as the White Squall.

(c) That the unloading of the shipment of barbed wire hereinafter mentioned, out of the condition and quantity of which libelant's cause of action arose, was begun at Long Beach, California, harbor on July 29, 1946; that libelant first learned of the rusty condition of said barbed wire on July 31st, 1946; that libelant [377] first learned of the falsity of the hereinafter-mentioned bill of lading on or about September 4, 1946; that this suit in admiralty is therefore brought within the two-year statutory period allowed therefor by the provisions of Section 5 of the Act of March 9, 1920, known as the Suits in Admiralty Act (41 Stat. 525; 46 U.S.C.A. 745), in that it is brought within two years after libelant's cause of action arose.

IV.

That this Honorable Court has jurisdiction of this libel under the provisions of Section 2 of the Act of March 9, 1920, known as the "Suits in Admiralty Act" (41 Stat. 525; 46 U.S.C.A. 742).

V.

(a) That at all times herein mentioned Dulien Steel Products, Inc., of California was and now is a corporation organized and existing under the laws of the State of California. That libelant is informed

and believes, and upon that ground alleges, that at all times herein mentioned the names "Dulien Steel Products, Inc., of California," and "Dulien Steel Products, Inc.," were used interchangeably by said corporation or corporations, and the said corporations are collectively hereinafter referred to as "Dulien."

(b) That at all times herein mentioned the Citizens National Trust and Savings Bank of Los Angeles, sometimes hereinafter referred to as the "bank," was and now is a national banking association organized and existing under the laws of the United States of America and located and having its principal place of business within the jurisdiction of this Court, to wit, in the City of Los Angeles, County of Los Angeles, State of California; and during all the times herein mentioned said bank was and now is engaged in a general banking business in Los Angeles, California.

(c) That at all times herein mentioned Matson Navigation [378] Company, hereinafter referred to as "Matson," was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of San Francisco, California, but maintaining also a business office in the City of Los Angeles, California.

VI.

That libelant is informed and believes and upon that ground alleges that Matson Navigation Company at all times herein mentioned and in all its

conduct herein mentioned was acting as the agent of the respondents United States of America, United States Maritime Commission and the War Shipping Administration under a written agency agreement or other contract with the terms of which libelant is not familiar; that all the acts and things herein alleged to have been done and performed by Matson were so done and performed by it as such agent of the respondents, and that Matson was thereunto duly authorized, and that such acts and things so done and performed by Matson were the acts of Matson's said principals, the respondents herein, and that the respondents are fully liable to libelant for any and all damages resulting to him therefrom.

VII.

That on or about the 11th day of July, 1946, at Los Angeles, California, Dulien orally offered to sell to libelant at the price of One Hundred Seven (\$107.00) Dollars per ton, f.o.b. Los Angeles, approximately 2,700 tons of unused Government surplus barbed wire, hereinafter referred to as "wire," consisting of 1,350 tons of galvanized wire and 1,350 tons of black wire, which said Dulien then orally represented to libelant was owned by said Dulien and was in transit from Honolulu, Hawaii, on the Matson Navigation Company's steamship White Squall, and was due to arrive in the harbor in Los Angeles, California, on or about July 22, 1946, and then and there exhibited to libelant a [379] number of sample coils, or rolls, of good black and galvanized wire free from rust and covered with a

rust-preventing grease, and produced and exhibited to libelant certain additional sample cuttings of good black wire, likewise free from rust, and, as inducement to libelant to make such purchase, orally agreed and expressly warranted that the wire to be so sold to libelant had been, was and would be covered with a coat of protective, rust-preventing grease and was and would be in all respects equal in quality to said exhibited coils and sample cuttings.

VIII.

That libelant, after examining said samples and in reliance upon said Dulien's said representations and express warranty, accepted said offer and agreed to purchase from Dulien said wire, and agreed to pay therefor the sum of \$288,900.00, payable upon drafts by Dulien against credits to be established with the bank before July 22nd, 1946. That on account of delay of the "White Squall" in arriving in the Long Beach Harbor, as hereinafter alleged, said date of July 22nd, 1946, was thereafter by Dulien orally extended to include July 27th, 1946.

IX.

That said purchase and sale were evidenced by a written sale order on a form supplied and prepared by Dulien the following day, that is, July 12, 1946, dated July 12, 1946, bearing No. LA-712, duly signed by Dulien in the name of Dulien Steel Products, Inc., and approved and accepted in writing by libelant, a copy of which sale order is attached hereto, marked Exhibit "A" and hereby

made a part hereof. That thereafter, on July 26, 1946, Dulien orally represented to libelant that the shipment of wire would be only 2,300 tons, of which Dulien would retain for itself 300 tons, to which change in quantity libelant orally agreed, and thereupon and in that manner by said mutual agreement between libelant and Dulien the quantity of libelant's said [380] purchase was reduced to 2,000 tons.

X.

That said steamship was delayed and docked on July 26, 1946, at Pier A at the Long Beach, California, harbor, instead of the Los Angeles harbor; and on July 27, 1946, before libelant had seen any of the wire, and within the time which had been by Dulien orally extended to include that day, libelant purchased from the bank upon a written application therefor and received from the bank and delivered to Dulien said bank's irrevocable letter of credit, by its terms good until July 31, 1946, in favor of Dulien for \$214,000.00 to cover the purchase price of 2,000 tons of wire at \$107.00 per ton, a true copy of which letter of credit is attached hereto marked Exhibit "C" and hereby made a part hereof. That a copy of libelant's application for said letter of credit is attached hereto, marked Exhibit "B," and hereby made a part hereof.

That by the terms of said letter of credit and the written application therefor the bank was instructed by libelant, and it bound itself, to pay to Dulien \$214,000.00 on Dulien's sight drafts accompanied by a full set of clean on board ocean bills

of lading made out to order, endorsed in blank and marked freight prepaid, and by commercial invoices evidencing shipment of 2,000 tons of barbed wire in one shipment, invoiced on basis of c.i.f. Los Angeles harbor, to be shipped from Honolulu, Hawaii, to Los Angeles harbor. That on the same date of July 27th, 1946, and simultaneously therewith libelant orally instructed the bank that upon the bank's receipt of said required bills of lading it should give authority to libelant's Los Angeles shipping agent, Mattoon & Co., Inc., to ship said wire to South America, subject to directions to be thereafter given by libelant.

XI.

That on July 29, 1946, before libelant had seen any of said [381] wire and before any of said wire had been unloaded from the ship, the bank in disregard and violation of the terms of said letter of credit and the instructions given it by libelant in libelant's application therefor, and particularly without receiving from Dulien any bill of lading whatsoever, paid over and delivered to Dulien the full agreed purchase price of 2,000 tons of wire, to wit: the sum of \$214,000.00.

XII.

That there was thereafter unloaded on the dock at Pier A in Long Beach Harbor for libelant from said steamship "White Squall" only 1,919 tons of wire, or 81 tons less than the 2,000 tons paid for by the bank on libelant's behalf as above alleged.

That none of said wire for which the bank made said payment of \$214,000.00 was of the quality or in the condition warranted by Dulien, or according to the samples exhibited by Dulien to libelant as above alleged, but the entire lot was badly rusted and unmerchantable and inferior in all respects to said samples and was of a then undetermined value; and said shipment was 81 tons short of the agreed quantity. That in an effort to determine what could be done with said wire and to minimize the loss thereon, libelant then, with the full knowledge and written consent of the bank and Dulien, and after written notice to Matson and with Matson's full knowledge, sold 25 tons of said wire at the price of \$65.00 per ton for the purpose of experimental cleaning, called "pickling," by the purchaser. That said experiment was made and the result thereof was the ascertainment, and libelant hereby alleges, that 1,760 tons of the wire was in such rusty condition that there was no market for it in Los Angeles County for use in the United States, and its highest market value and the best price obtainable for it in Los Angeles County for export was \$51.00 per ton; that 134 tons of said wire was in such rusty condition that its reasonable market value in Los Angeles County was [382] only \$4.50 per ton, and by and with the written consent of Dulien and the bank, and after notice to Matson and with Matson's full knowledge, 104 tons thereof was sold for junk at \$4.50 per ton.

XIII.

That said wire was shipped from Honolulu, Hawaii, to Los Angeles on the "White Squall" and said shipment was made under a bill of lading issued by Matson to Dulien. That libelant does not have and never has had said bill of lading, but libelant is informed and believes and upon that ground alleges: that said bill of lading for 4,599,948 pounds, which is approximately the equivalent of 2,300 tons, of wire, whereas the quantity of wire actually shipped thereunder was only 2,219 tons, or 81 tons short of the quantity shown in said bill of lading; that said bill of lading was what is in the shipping business known as a straight clean bill of lading, that is, it was a straight bill of lading which upon its face showed that Dulien was both the shipper and the consignee of the wire, and that said wire had been received by Matson from the shipper (Dulien) in apparent good order and condition except as therein otherwise noted, and that there were no exceptions noted in said bill of lading. That there is attached hereto, marked Exhibit "D" and hereby made a part hereof, what libelant is informed and believes and therefore alleges to be (except for the pen-written words "Deft. Matson A—P.S. Noon" subsequently written thereon) a photostatic copy of said bill of lading.

XIV.

That libelant is informed and believes, and upon that ground alleges, that at the time said bill of lading was issued by Matson said wire was obvi-

ously badly rusted and was not in such condition as to warrant the issuance of a clean bill of lading thereon but, on the contrary, was in such obviously bad condition on account of said rust as to require, under the provisions of Section [383] 22 of Chapter 415 of the Act of August 29, 1916 (U.S.C.A. Tit. 49, Section 102), the notation on the bill of lading of exceptions to the "apparent good order and condition" representation therein contained; that said bill of lading consisted of a printed form into which there had been typed certain information applicable to this particular shipment, showing, among other things, the name of the shipper, the name of the ship, the name of the consignee and the quantity of wire supposed to have been delivered to the carrier; that thereafter in conformance with said bill of lading a freight bill upon a printed form was issued by Matson containing in typewriting those same insertions as to description and quantity of said wire copied from said bill of lading, and that said freight bill did not contain any exceptions or notations of exception to the "good order and condition" representation made in said bill of lading as to the condition of said wire; that it was then the custom and practice of Matson, with which custom and practice the bank was then familiar, to cause each freight bill issued by it to contain all the descriptive information about the shipment covered thereby as was contained in the bill of lading issued upon the same shipment; and that therefore the freight bill so issued by Matson was false in that it did not contain a notation of the obviously

rusty condition of said wire and it was for 81 tons more wire than was actually shipped; that a copy of said freight bill is hereby attached, marked Exhibit "E," and hereby made a part hereof; that when Dulien on July 29, 1946, presented to the bank Dulien's drafts for \$214,000.00 drawn against libelant's said letter of credit, as above alleged, said drafts were accompanied by the above-mentioned freight bill instead of the clean order bill of lading specified in and required by the terms of said letter of credit, and that the bank carelessly and negligently mistook said freight bill for the required bill of lading and made said \$214,000.00 payment to Dulien thereon. [384]

XV.

That Dulien and Matson caused said wire to be unloaded onto the dock without segregation as to quality, and in order to determine the reasonable market value thereof in Los Angeles County as \$51.00 per ton, or any other definite sum, and in order to minimize the loss resulting from the condition of said wire as delivered, it was reasonably necessary that there be expended or incurred, and the libelant for that purpose, prior to October 22nd, 1946, did **expend or authorize the expenditure of** the following sums of money, or incurred the following obligations, in the necessary selection, segregation and moving of said wire on the dock, and in wharf and dock charges thereon while said wire remained upon the dock at Pier A in Long Beach, to wit:

Dock storage	\$2,837.45
Inspection by Los Angeles Cargo appraisers	39.85
Segregation and supervision	48.00
Extra drayage on account of poor condition of wire	130.50
Sorting labor on account of poor condition of wire	2,734.86
Extra charges by Mattoon & Co., Inc.....	750.00
	<hr/>
	\$6,540.66

That each and all of said special expenses constituted additional loss and damage as a direct and proximate result of Matson's said issuance of said false bill of lading on said wire so sold to libelant.

XVI.

That as the direct and proximate result of Dulien's said breach of warranty and its said misrepresentations as to said wire it became and was necessary that libelant remain in California [385] until proper disposition could be made of said wire for the purpose of minimizing the loss, and libelant did remain in California away from his own country and business for three months, and his living expense cost of such stay was \$3,000.00; and libelant alleges that within that time he expended that sum in living expenses and that the expenditure thereof was made necessary in the minimizing of the loss on said wire.

XVII.

That the negligence of Matson, and of its prin-

cipals, the respondents herein, in issuing said false bill of lading and said freight bill following the inserted language of said bill of lading as to the condition and quantity of said wire combined with the negligence of the bank in paying thereon, and the direct and proximate result of said combined negligence of Matson, and its principals, the respondents herein, and the bank together was loss and damage to the libelant in the following sums of money on the following accounts, to wit:

- (a) The full purchase price of \$107.00 per ton for 81 tons of wire which were never delivered to plaintiff, amounting to\$ 8,667.00 together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;
- (b) The difference between the purchase price of \$107.00 per ton and the sale price of \$65.00 per ton, or \$42.00 per ton, for 25 tons of wire sold to Gonzales & Blanco for experimental "pickling" as hereinbefore alleged, amounting to 1,050.00 together with interest thereon [386] at the rate of 7% per annum from July 29, 1946, until paid;
- (c) The difference between the purchase price of \$107.00 per ton and the \$51.00 per ton reasonable market value at Los Angeles, California, of 1,760 tons of wire, or \$56.00 per ton,

amounting to	98,560.00
together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;	
(d) The difference between the purchase price of \$107.00 per ton and the \$4.50 per ton actual value at Los Angeles, California, of 134 tons of wire, or \$102.50 per ton, amounting to	13,735.00
together with interest thereon at the rate of 7% per annum from July 29, 1946, until paid;	
(e) The extra expense set out in full in the foregoing Paragraph XV, amounting to	6,540.66
together with interest thereon at the rate of 7% per annum from October 22, 1946, until paid;	
(f) Plaintiff's personal living expenses in California for three months while attempting to minimize the loss on said wire, as set out in full in the foregoing Paragraph XVI, amounting to	3,000.00
together with interest thereon [387] at the rate of 7% per annum from October 22, 1946, until paid;	

Totaling, exclusive of interest..\$131,552.66

XVIII.

That there is now pending in the above-entitled Court a civil action, No. 7358-PH, entitled J. B. Londono, Plaintiff, vs. Dulien Steel Products, Inc., of California, et al., Defendants, in which the libelant herein is plaintiff, and Dulien, the bank and Matson Navigation Company are defendants; that respondents named in this libel in personam are not parties to said civil action because libelant did not know at the time said action was filed that the protection of his rights required that suit be brought against the respondents herein; that since the filing of said civil action libelant has learned that it is the intention of Matson, who has not yet answered in said civil action, to contend that not Matson itself, but its principals, the respondents herein, are liable to libelant, if anybody is liable, for the alleged negligence of Matson hereinabove set forth; and that this suit in admiralty is brought for the purpose of enforcing any rights which the libelant may have against the respondents herein as the owners of the S.S. White Squall, and, therefore, the parties liable for the negligence of their agent Matson in the issuance of the alleged false bill of lading; and in due time request will be made of this Court that this suit in admiralty be consolidated for trial with the said civil action at law No. 7358-PH.

XIX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of

the United States and of this Honorable [388] Court.

Wherefore, said libelant prays that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said United States of America, and United States Maritime Commission, and the War Shipping Administration, and that respondents may be cited to appear and answer upon oath all and singular the matters aforesaid; that this Honorable Court will be pleased to decree payment to said libelant from said respondents of the damages aforesaid in the sum of \$131,552.66, with interest and costs, and that said libelant may have such other and further relief in the premises as in law and in justice he may be entitled to.

/s/ THOMAS S. BUNN,

Proctor for Libelant. [389]

State of California,

County of Los Angeles—ss.

Thomas S. Bunn, being first duly sworn, deposes and says: That he is the proctor for the libelant in the foregoing libel in personam; that the said libelant resides, and according to affiant's latest information is now, in the Republic of Colombia, South America, and is, therefore, not now available to verify said libel; that affiant has represented the libelant in the matters set forth in said libel at all times since August 10, 1946, and within that time has had occasion to investigate and has investigated

the facts and circumstances set out in said libel, and has been present at the taking of several depositions in relation thereto; that he has now in his personal possession many of the documents mentioned in said libel; that from said investigations, from conferences with witnesses, and from the examination of pertinent documents, affiant has acquired a large quantity of information about the subject matter of said libel, and he believes that upon said information he is qualified to verify said libel; that affiant has read the foregoing libel and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief obtained from the above-stated sources, and that he makes this verification for and on behalf of the libelant and because the libelant is in South America and not available to verify it himself.

/s/ THOMAS S. BUNN.

Subscribed and sworn to before me this 26th day of July, 1948.

[Seal] /s/ NAOMA C. HART,
Notary Public in and for
Said County and State.

My commission expires Mar. 21, 1952. [390]

MATSON NAVIGATION COMPANY, Master's Agent

BILL OF LADING

WARSHIP-SHORTBLADING 12-15-42

DATE
7/12/46PORT OR PLACE OF LOADING
HONOLULUPORT OR PLACE OF DISCHARGE
LOS ANGELESNAME OF VESSEL
WHITE SQUALLVOY. NO.
200/41B/L NO.
LA 29

ISSUED AT

FOR TRANS-SHIPMENT TO

VIA

SHIPPER:-

CONSIGNEE TO

(MAILING ADDRESS—NOT FOR PURPOSES OF DELIVERY)

DULIEN STEEL PRODUCTS OF CALIF.
C/O LACY HOFIUS. MOANA HOTEL
HONOLULU T.H.DULIEN STEEL PRODUCTS OF CALIF.
11611 SOUTH ALAMEDA STREET
LOS ANGELES. CALIFORNIAMARKS
(AS GIVEN BY SHIPPER)

PACKAGES

KIND OF
PACKAGEDESCRIPTION OF GOODS AND CONTENTS OF PACKAGES
AS GIVEN BY SHIPPERSHIPPER'S MEASUREMENT AND WEIGHT
CUBIC FEET

WEIGHT

NONE

55428

ROLLS BARBED WIRE

45999948

5299974

Deft
Matson A
Phoon

TOTAL PACKAGES

WEIGHTS AND OR MEASUREMENTS
SUBJECT TO CORRECTIONS

CUBIC FEET	WEIGHT	RATE	FREIGHT	TRUCK TAX	TOLL OR WHARFAGE	TERRITORIAL TOLL	ADVANCE CHARGES	P H T CHARGE	TOTAL FREIGHT
4599948	10 30	23689.73	574.99	919.90					25184.62
TOTAL PREPAID									
TOTAL COLLECT									25184.62

Paid

RECEIVED for shipment from the shipper above named the goods, or packages said to contain goods, as described above in apparent good order and condition, and otherwise indicated in this bill of lading, to be transported to the port of discharge and there to be delivered or transhipped on the terms hereinafter stated.

IN ACCEPTING THIS BILL OF LADING, the shipper, consignee, pledgee, holder or endorsee of this bill of lading, receiver, owner of the goods and each of them, agree that all freight engagements, dock receipts or other agreements whatsoever in respect of the shipment of the goods are hereby accepted, and agree to be bound by all its terms whether written, printed or stamped on the front or back thereof or incorporated by reference therein, any customs or provisions of law to which such goods are subject, and to indemnify and hold the Company harmless from all claims, damages, losses, expenses, costs, charges, interest, and attorney's fees, which may be incurred by the Company in connection with the shipment of the goods, and to pay the same when and as they may be due.

If the ship is not owned by or chartered to the War Shipping Administration or the United States Government, the bill of lading shall be subject to the provisions of the Espionage Act, 50 U. S. C., 31 and 38 as amended, its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law.

IN WITNESS WHEREOF, the Master of the said ship has affixed to one bill of lading.

FOR THE MASTER

By MATSON NAVIGATION COMPANY
as Agent for the Master

By

THE SCOPE OF THE VOYAGE IS REFERRED TO IN THE PREAMBLE AND CLAUSE 3 OF "WARSHIPPLADING" REFERRED TO HEREIN.

CAUTION

This document contains information affecting the national defense OF the United States within the meaning of the Espionage Act, 50 U. S. C., 31 and 38 as amended. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law.

In every contingency whatsoever and even in case of deviation or of unseaworthiness of the ship at time of loading or at any subsequent time, the rights and obligations, whatsoever they may be, of each and every person having any interest or duty whatsoever in respect of the receipt, care, custody, carriage, delivery or transshipment of the goods whether as shipper, consignee, holder or endorsee of the bill of lading, receiver or owner of the goods, master of the ship, carrier, shipowner, demise charterer, time charterer, operator, agent bailee, warehouseman, forwarder or otherwise howsoever, shall be subject to and governed by the terms of the Uniform Bill of Lading (Warship-lading 7-1-42) adopted by General Order No. 16 of the Administrator, War Shipping Administration, July 4, 1942, with the exception of Clause 27 thereof which shall be deemed to be incorporated herein, including any amendments thereto or special provisions thereof which may be in effect at the time the goods are received for shipment and applicable to the intended voyage. Copies of such Uniform Bill of Lading and amendments may be obtained on application to the War Shipping Administration, Washington, D. C., or to any of its District Offices or to the Agent of the Master at the port of shipment or port of discharge. This shipment shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act shall (except as may be otherwise specifically provided in the bill of lading referred to above) govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier. Nothing herein contained, whether by expressed statement, reference, implication or otherwise, shall be deemed a surrender of any rights or immunities or an increase of any responsibilities or liabilities which the ship, her owner, charterer, operator, agent or master or any carrier, bailee, warehouseman or forwarder of the goods or the agent of any of them would have in the absence of this bill of lading. None of the terms of this bill of lading shall be deemed to have been waived by any person unless by express waiver signed by such person, or his duly authorized agent.

NOTICE

If the goods herein covered are carried on a vessel owned by or under bareboat charter to the United States and which is a Public Vessel of the United States, War Shipping Administration, on behalf of the United States, hereby assumes all liabilities it would have with respect to the carriage of such goods if the vessel were a merchant vessel except with respect to cargo owned by the United States or any Agency or Department thereof, and lend-lease cargo. This clause is to be construed only as an agreement that such cargo when carried on such a Public Vessel shall be treated as though the carrying vessel were a merchant vessel with respect to liabilities for loss or damage to such cargo.

[The following list of Exhibits attached to the foregoing document are identical to Exhibits attached to the Complaint; Ex. A is identical to Ex. A, Ex. B is identical to Ex. B (face), Ex. C (face) is identical to Ex. C, Ex. C (reverse) is identical to Ex. B (back), Ex. E (face) is identical to Ex. D. (face), Ex. E (reverse) is identical to Ex. D (back).]

[Endorsed]: Filed July 26, 1948.

[Title of District Court and Cause.]

ANSWER OF THE RESPONDENTS

The respondents, United States of America, United States Maritime Commission and the War Shipping Administration, hereinafter referred to as respondents, answer libelant's Libel as [399] follows:

First Defense

* * *

XIII.

Answering paragraph XIII of said Libel, these respondents admit that the libelant does not have and never has had said bill of lading, or any copy thereof; admit that the said bill of lading was for approximately 2,300 tons of wire, but deny that the quantity of wire actually shipped was only 2,219 tons or any quantity less than the quantity specified in said bill of lading attached to the Libel and marked Exhibit D; admit that said bill of lading

was what is in the [401] shipping business known as a straight clean bill of lading, showing on its face that the Dulien Steel Products of Calif. was both the shipper and the consignee, and that said wire had been received from the shipper (Dulien) in apparent good order and condition except as therein otherwise noted, and that there were no exceptions noted on said bill of lading; [402]

* * *

Fourth Defense

The bill of lading actually issued for the shipment described in said Libel, which said bill of lading is annexed to the Libel as Exhibit D, showed on its face that it was a straight bill of lading, that is, a bill of lading wherein the shipper and consignee were the same party, and wherein the shipment was not to the order of the shipper but was non-negotiable; by reason thereof, these respondents were under no duty by statute, rule of law, or otherwise, to indicate thereon the condition or quality of the shipment carried on said vessel.

* * *

Sixth Defense

Even if these respondents issued a false bill of lading, as alleged by the libelant in paragraphs XIII, XIV and XVII of this Libel, these respondents allege that at no time, in connection with any of the transactions mentioned in the Libel, did said libelant rely in any manner whatsoever upon the statements or any statement contained in said bill of lading, and in fact said libelant in said Libel

admits that he has never seen or had possession of said bill of lading, or even of a copy thereof, and as a consequence there could have been no reliance by said libelant upon any of the terms of said bill of lading. [404]

* * *

Eighth Defense

The contract of carriage for the shipment described in the Libel represented by the bill of lading, attached to the Libel and marked Exhibit D, was one between Matson Navigation Company and Dulien Steel Products, Inc., of California, which said contract was for the carriage of the shipment therein described from Honolulu to Los Angeles; said contract between Matson and Dulien was fully performed and completed by Matson prior to the assignment, if any, or purported assignment of said bill of lading to the libelant, and by reason thereof, libelant did not acquire and could not acquire any rights whatsoever against Matson, either individually or as agent of the United States of America, and in that behalf these respondents further allege that by issuing at Dulien's request a straight bill of lading wherein the shipper and the consignee were the same party, Matson had no reason, and, by the exercise of reasonable care, could have no reason, to believe that Dulien could or would attempt to assign or negotiate said bill of lading to any third party. [405]

* * *

Wherefore, respondents pray that the libelant

take nothing by his Libel, and that these respondents be hence dismissed with their costs of suit.

JAMES M. CARTER,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division.

/s/ BERNARD B. LAVEN,
Assistant U. S. Attorney,
Attorneys for Respondents.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 26, 1949. [407]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 7358-PH Civil

Honorable Peirson M. Hall, Judge Presiding.

J. B. LONDONO,

Plaintiff,

vs.

DULIEN STEEL PRODUCTS, INC., OF CALI-
FORNIA, a Corporation, DULIEN STEEL
PRODUCTS, INC., a Corporation, CITIZENS
NATIONAL TRUST & SAVINGS BANK OF
LOS ANGELES, a National Banking Associa-
tion, MATSON NAVIGATION COMPANY,
a Corporation, et al DOES,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

September 29, 1947

Each witness whose testimony is hereinafter
quoted or narrated was duly sworn before testifying.

At the hearing of the motion of defendant Bank
to Dismiss, the following proceedings were had, Mr.
Cramer appearing for defendant Bank.

* * *

The Court: Let us take and apply the World's
Columbian Exposition case and the doctrine laid
down here and assume that that is the correct doc-
trine. They have there an exculpating contract from

any responsibility for damages of any kind however originating. They do not have a provision—it is not referred to, I have not read the whole case; I assume it is not or you would have called my attention to it—in there such as the one in this document that I have here, in Exhibit B, which limits that exculpation to anything done in good faith.

Mr. Cramer: That is true, but unless the allegations of the complaint show that this was done in wanton or wilful negligence amounting to a breach of good faith, there is no charge that there was anything but a mistake or error. In fact, the third cause of action, as I recall it, asserts that the Bank through error, mistakenly paid it without obtaining a bill of lading. That, as I say, we cannot take notice of, but there is nothing in the second cause of action that shows any bad faith on the part of the Bank, and I claim that it is incumbent upon the pleader to show gross or wanton or wilful negligence amounting to bad faith.

The Court: I do not think so, counsel. The particular contract here calls for a definite and specified kind of bill of lading, and while it has all of the other clauses giving latitude to the action of the Bank, it nevertheless does provide for an identifiable kind of a bill of lading.

Now they say that the Bank paid the money out without any bill of lading, and they base their claim upon a violation of contract. It seems to me that in such a situation good faith is a defense. Mind you, that comes from old-fashioned pleadings.

I do not approve generally of pleadings drawn by lawyers who come in and point fingers at somebody and make them spend two or three months in court proving the plaintiff's case, the so-called rules of simplified pleadings.

Mr. Cramer: The only authority I have on this point is the Exposition case.

The Court: So I think that I must deny your motion to dismiss on that ground.

* * *

April 18, 1950—10:00 A.M.

The Following Proceedings Were Had

* * *

The Court: Londono v. Dulien Steel Products.

Mr. Bunn: Ready for the plaintiff, your Honor.

Mr. Dasteel: Ready.

The Court: Very well. For the plaintiff we have Mr. Bunn, for the defendant Dulien Steel Products of California and Dulien Steel Products, Inc., Mr. Joseph Dasteel.

Mr. Dasteel: Ready, your Honor.

The Court: For Citizens National Trust and Savings Bank, Cosgrove, Cramer, Diether & Rindge, by——

Mr. Diether: Mr. Diether and Mr. O'Malley.

The Court: And Matson Navigation [4-A*]
Company?

Mr. Aldwell: Brobeck, Phleger & Harrison, by
Alan B. Aldwell. [5]

* * *

The Court: Let me see if I have your proposal correctly.

Mr. Dasteel proposes to stipulate that the wire involved in this suit was unused Government surplus barbed wire as purchased by defendant Dulien Steel Products, Inc., of California from the Interior Department of the United States Government.

Mr. Dasteel: That is correct.

The Court: Mr. Bunn?

Mr. Bunn: I can go along with him only as to all the words except the word "as." I will stipulate that the proposal is true.

The Court: Except for the word "as"?

Mr. Bunn: Except for the word "as."

The Court: In other words, you will stipulate that the wire involved in this suit was unused surplus barbed wire purchased by the defendant Dulien Steel Products, Inc., of California from the Interior Department of the Government?

Mr. Bunn: I will.

Mr. Dasteel: I will accept that change, your Honor.

The Court: Is there anybody who does not?

Mr. Diether: So stipulated.

The Court: Does everybody stipulate?

Mr. Hubert Morrow: Yes, sir. [10]

Mr. Laven: The Government so stipulates, your Honor.

The Court: Very well.

Mr. Dasteel: Now if there are no other motions, and I presume we have reached a point now where the plaintiff is about to put on his case, I would like

to make a motion, your Honor, the motion to dismiss against the defendant Dulien Steel Products on the grounds——

The Court: Which one?

Mr. Dasteel: Both of the Dulien Steel Products, Inc., and all of the Dulien interests which the plaintiff may have in mind.

The Court: There are two entities named.

Mr. Dasteel: Both of them, your Honor.

The Court: That is, Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc.?

Mr. Dasteel: Yes, your Honor—on the grounds that the allegations of the complaint fails to state a cause of action in that plaintiff's own Exhibit A provides for the purchase of unused Government surplus wire as purchased by seller from the Interior Department, and nowhere in the complaint is that denied.

In other words, the plaintiff received just what he ordered and there is no denial of that fact.

The Court: How could he deny anything in an affirmative allegation? [11]

Mr. Dasteel: He doesn't say anywhere that he did not receive what he ordered.

The Court: I am afraid I will have to disagree with you. The motion is denied.

Are there any more preliminaries?

Mr. Diether: May I inquire of Mr. Dasteel through the Court if it is proper, in referring to the two clients he represents, to refer to them merely as "Dulien"? Are they both interchangeable and does one refer to the other?

The Court: Mr. Bunn tried to get that straightened out last week, and his stipulation was declined, and Mr. Bunn stated that he would be forced to be put on his proof and would put on his proof as to the identity of the various defendants Dulien Corporation.

Mr. Diether: I am sorry.

Mr. Dasteel: If your Honor please, if it will assist in clearing up this matter, the Dulien Steel Company in Los Angeles is a corporation, it is the Dulien Steel Products, Inc., of California, a California corporation. There is no other company. I can't understand why the plaintiff named it twice, but in order that it might be covered in answering I answered under both names so that there wouldn't be any question about it. I can't understand why there should be any question at this time.

Mr. Bunn: If your Honor please, that statement by Mr. [12] Dasteel may clear up the matter that arose last week. It is obvious from the documents that Dulien signed some of them in the one language and some of them in the other language, that is, Dulien Steel Products, Inc., and some Dulien Steel Products.

The Court: Mr. Dasteel, to settle the matter, let me suggest that it be put in this form, that you offer a stipulation that there is only one Dulien Corporation, a corporate defendant, involved, that its true name is Dulien Steel Products, Inc., of California, and that it is a California corporation, and that there is no other corporation involved in

any of the transactions in this complaint bearing the name of Dulien or similar ones.

Mr. Dasteel: I make such a stipulation, your Honor.

The Court: Is that agreeable to everybody?

Mr. Laven: Not to the Government, your Honor.

The Court: Then that is the end of that. Very well.

Mr. Bunn?

Mr. Bunn: I take it, your Honor, that since we have been here so many times on various and sundry points of this case, that it might be a constructive thing for me to make a fairly brief opening statement of facts, or would your Honor welcome that?

The Court: Since you were here last week I have read the pleadings through and the various memoranda. I have not [13] read any of the depositions. I think I have a general notion of what the lawsuit is about. It will require some clarification as to the legal positions asserted by each party because their counterclaims and, let me call them suppositive counterclaims, suppose a judgment is against me then I am entitled to recover against somebody else—I have not been able to trace all of those through yet. Everybody is in favor of somebody else winning as long as he does not lose.

Now it may be it would be exceedingly helpful if you could trace that through, or if you prefer, Mr. Bunn, you can make an opening statement as to what you expect to prove in more elaboration than you have done so in your pleadings.

Mr. Bunn: I think that would be well, and I make this request of the court, that if I appear to go into more detail than your Honor considers helpful, you will stop me, I am sure, but I don't care to recite the whole case at this time and I am sure you don't care to hear it, but I believe it is well to make a statement.

The Court: In your opening statement, to avoid objection by counsel if you should happen to assert something as a fact, it will be deemed that you have stated that that is what you expect to prove to be the fact?

Mr. Bunn: Yes, indeed.

The Court: Very well. [14]

Mr. Bunn: And, furthermore, my statement will not be a complete statement of every fact I propose to prove, but whatever I say here is a statement of my understanding of what the plaintiff expects to prove.

The Court: Very well.

Opening Statement in Behalf of the Plaintiff

Mr. Bunn: We expect to prove that the plaintiff, Mr. J. B. Londono, a resident and citizen of the Republic of Colombia, was in Los Angeles in the summer of 1946 for the purpose of locating and buying barbed wire to be sent to South America for use there;

That on the 11th day of July, 1946, there came to his attention the fact that Dulien Steel Products, Inc., of California, which I shall hereafter in my remarks refer to as "Dulien," was supposed to have some wire.

That on that day, the 11th of July, he himself went to the office of Dulien on South Alameda Street and there conferred with Dulien's manager, Mr. E. S. Grinstein, about the possibility of purchase by Londono of barbed wire from Dulien;

That he then and there learned in the conference with Mr. Grinstein that Dulien had barbed wire, unused Government surplus wire, coming from Honolulu, which with it coming Mr. Londono understood to mean on the high seas then;

That arrangements were then and there, on that day, July 11, made for the purchase of 2,700 tons of such wire at [15] the price of \$107 per ton;

That Mr. Londono left Dulien's office and on the next day, the 12th day of July, 1946, returned in person to Dulien's office, and that by or on that occasion there was prepared in Dulien's office a sale order bearing No. LA-712, Dulien's number, for the sale to J. B. Londono of 2,700 tons of such wire at such price;

That that sale order——

The Court: Do you have the original there?

Mr. Bunn: Yes, sir; I have the original.

* * *

It is Plaintiff's Exhibit A to the complaint.

The Court: Very well.

Mr. Bunn: And Plaintiff's Exhibit A to the libel.

That the language of that document, that sale order, under the heading "Commodity" was unused

Government surplus barbed wire as purchased by seller from Interior Department;

But that on July 11th, the first day of Mr. Londono's visit to Dulien's office and before the sale order was [16] prepared, Mr. Londono was told by Mr. Grinstein, the manager, that this wire, which was available and would be sold to him, was good wire;

That it was good, black and galvanized wire, free from rust and covered with a rust-preventing grease, and at that time there were exhibited to Mr. Londono on the lot at Dulien's place rolls of wire, good wire, with nothing apparently wrong with them at all.

The Court: Galvanized and black?

Mr. Bunn: No; black wire, and samples were given to him of black wire, I mean cuttings as distinguished from the showing to him of rolls of wire. There were cuttings given to him of black wire, and he was told that all the wire would be as good as that which was shown to him, although some of the wire would be galvanized and some would be black.

In other words, it would be good galvanized wire and good black wire, with nothing wrong with it at all of either kind;

That it would in all respects be equal in quality to the exhibited coils and sample cuttings;

That Mr. Londono, in reliance upon and after examining the samples and after seeing the samples of rolls and examining the samples of the cuttings, and hearing and relying upon the representations made, accepted the offer and agreed to purchase

the quantity I have stated from Dulien. That was on [17] the 11th.

That on the 12th, when he went back and the sale order had been prepared, Mr. Dulien himself, who had not been there on the 11th when Mr. Londono talked with Mr. Grinstein, the manager, was there, and that Mr. Dulien himself, president of the corporation, I believe, told Mr. Londono that the wire coming was good, that he himself had been to Honolulu and had seen the wire in Honolulu, and that it was good and that he would like to be able to buy 50,000 additional tons of it if he could;

That in reliance upon representations by Dulien through Mr. Grinstein, and Mr. Dulien himself, Mr. Londono signed the sale order referred to as Exhibit A to the complaint, dated July 12, and that that sale order under another heading as to the quantity, says "approximately 2,700 net tons as follows: 1,350 net tons galvanized, 10 per cent more or less, 1,350 net tons black, 10 per cent more or less," and that in the initial conversations, which were the inducement to the signing of this order, he had been told that there would be half and half, that is, half of the 2,700 quantity would be galvanized, good wire, as I have stated, and the other half would be black wire, good wire, as I have stated; [18]

* * *

That the sale order was signed "Dulien Steel Products, Inc., by E. S. Grinstein," and approved and accepted by J. B. Londono;

That the ship on which the wire was supposed to come was delayed;

That Mr. Londono learned of the delay and that before the ship arrived Mr. Londono was informed by Dulien that the shipment would not be 2700 tons but that it would be only 2300 tons;

That Mr. Londono, pursuant to that information and negotiations with Dulien, agreed that his total quantity which he would have to purchase, which he would purchase, would be 2000 tons and that instead of furnishing the money at \$107 for 2700 tons he would supply the money for 2000 tons.

The Court: What date do you propose to show that conversation, that modification of the agreement? [19]

Mr. Bunn: On July 26, 1946. I stated it was before the ship arrived. It was before Mr. Londono knew that the ship arrived, or it was before the ship arrived. We do not know at what hour. But at all events, that on July 26, 1946, which we now know and will show was the date on which the ship did arrive, defendant Dulien orally represented to plaintiff that the shipment of wire would be only 2300 tons.

Mr. Dasteel: Pardon me, if your Honor please. I think that there is no point involved there, that your complaint says that this was by mutual agreement. There is no question about that.

* * *

Mr. Bunn: Well, the fact is that we will show that it was mutually agreed between Dulien and Londono that the shipment would be only 2300

tons and that defendant Dulien would retain for itself 300 tons.

The Court: Was that conversation before July 27th?

Mr. Bunn: Yes, sir.

The Court: Very well.

Mr. Bunn: That reduction in quantity, that mutual agreement for reduction in quantity, was before July 27th. And to that change Mr. Londono agreed, and therefore, in that [20] manner by said mutual agreement the quantity plaintiff had purchased was reduced to 2000 tons. However, he was given an oral option to take the additional 300 tons.

The Court: That does not enter into the matter.

Mr. Bunn: That the steamer was delayed and docked on July 26, 1946, at Pier A at Long Beach instead of at the Los Angeles Harbor, but there is no controversy on that location of the arrival;

That on July 27, 1946—by the way, that in the meantime Mr. Londono received from Dulien word that unless Londono completed his establishment of the letter of credit for the entire purchase price by a certain hour on the day of July 26, that the deal would be off;

That Londono, on the 26th day of July, then went into the Citizens Bank, foreign department, and discussed with Mr. Schroeder, the vice-president of the bank, who was and is in charge of the foreign department, the matter of completion of the establishment of the letter of credit;

* * *

That he told Mr. Schroeder what he wanted to do

and why he wanted to do it, and what he intended to do with the wire, [21] and then he left the bank and went back on the 27th, having in the meantime obtained Dulien's approval of the completion of the letter of credit by the 27th rather than the afternoon of the 26th, and that on the morning of the 27th, which was Saturday, of July, 1946, he went back in the bank and completed the arrangements, that is that he signed an application for a commercial letter of credit for \$214,000 in favor of Dulien Steel Products, Inc., with its address in Los Angeles, for the account of J. B. Londono available by drafts at sight drawn at the Bank's option "on" you or your correspondent for 100 per cent of the invoice "cost." The drafts, according to the application for the letter of credit, must be accompanied by the documents listed below marked with an X, and that an X appears in the blank space provided therefor at the left end of a line which reads, "Full set of clean ocean bills of lading made out to order endorsed in blank, freight prepaid," and further down calling for commercial invoices evidencing shipment of 2000 tons of barbed wire in one shipment invoiced on basis of c.i.f. Los Angeles Harbor from Honolulu, T. H., to Los Angeles Harbor, credit to remain in force until July 31, 1946. [22]

* * *

And that the application was signed by J. B. Londono, and at the same time there was prepared by the Bank its irrevocable credit No. 3645, the same number which the application bore, dated

July 27, 1946, directed to Dulien Steel Products, Inc., and reading: "Gentlemen, we hereby authorize"——

The Court: You need not read it. I have read it.

Mr. Bunn: And that that document by typewritten insertions into a printed skeleton form says that the draft must be accompanied by the following documents, full set clean on board ocean bills of lading made out to order blank endorsed, marked freight prepaid, commercial invoices evidencing shipment of 2000 tons of barbed wire, etc., in one shipment from Honolulu;

That on the back of that letter of credit was a full page printed form which set out a great many terms and which contained, when it was completed and signed, the typed insertion of the Bank's charge of one-fourth per cent with a minimum of \$10. Those were the only insertions other than the number, and that Mr. Londono signed that form.

The Court: That contains a provision in there upon which the Bank relies as an escape of liability?

Mr. Bunn: Yes, your Honor. [23]

* * *

That the Bank agreed verbally to make Mr. Londono a loan of \$54,000, which would make up the difference between the \$160,000 and the \$214,000, and that there would be included in the loan the \$535 bank charge, which added that much to it;

That Mr. Londono left the bank;

That on that afternoon, Saturday, he went to the

Harbor—the ship had arrived; he had been informed in the meantime, on Friday I believe, that the ship had arrived—he went there but the hatches had not been opened, there was no one working there, it was Saturday afternoon, and he saw no wire, there was no wire on the deck of the ship;

That on Sunday he had no contact with any of the parties involved in the matter;

That on Monday morning, at an hour we will not be able to prove probably but early, Dulien's office, through some employee, sent somebody to Matson's office at Wilmington and paid the freight; [24]

* * *

That in Honolulu, under date of July 12, which was the same date of the conversation between Mr. Londono and Mr. Dulien, himself, and the actual signing of the sale order, under date of July 12 Matson Navigation Company, as agent for War Shipping Administration, that is, berth agent for War Shipping Administration, had issued a straight bill of lading for 2300 tons of barbed wire, stated in pounds rather than tons, but it amounted to 2300 tons, showing Dulien as the shipper and Dulien as the consignee.

The Court: Are you saying that this was known to Londono?

Mr. Bunn: No, sir. I certainly deny that.

The Court: Very well.

Mr. Bunn: I am saying that I am going back now to pick up what I am going to recite about the 29th of July. But on the 12th of July a straight

bill of lading, not an order bill, had been issued as I have just stated.

The Court: What is the difference between a straight bill and an order bill? [25]

Mr. Bunn: An order bill is highly negotiable. An order bill carries the title to the merchandise. An order bill is the means by which, in the shipping business, the right to the possession of the wire can be expressed and proven and is the most highly negotiable document which we have in the shipping business.

The Court: In other words, it is, deliver to the order of so-and-so?

Mr. Bunn: Yes, sir, and that a straight bill of lading, which does not contain the language of an order bill, to the order of anybody, but is from one person to the same person or to another person even without order, that a straight bill of lading is, may I say, of relatively no importance so far as the title to the merchandise is concerned, and not negotiable. It smacks somewhat, but slightly, of negotiability, as I shall explain later, but it is not the negotiable document which an order bill of lading is;

That that was issued on July 12 and that likewise at or about—still in July but we will not be able to prove what date—there was likewise issued in Honolulu an undated order bill of lading on 1500 tons of barbed wire to come over on the same ship, the SS White Squall, this order bill of lading being issued by Matson, likewise as agent for the War Shipping Administration, to Gonzalez &

Blanco, an outfit in Los Angeles likewise purchasing wire to be shipped on the [26] same ship.

Gonzalez & Blanco's representative had been to Honolulu and had seen wire there and had picked out wire that he wanted and had told Dulien's people over there that he would take this wire as distinguished from this other wire, and that the order bill of lading on the Gonzalez & Blanco shipment was f.o.b. Honolulu so that Gonzalez & Blanco had to pay its own freight, but that the straight bill of lading from Dulien to Dulien provided that Dulien would have to pay his freight on that wire;

That it was apparently the wire which Dulien was shipping from himself to himself, that Dulien purported to sell to Londono but that Dulien did not tell Londono anything about the absence of an order bill on the shipment that Londono was to buy;

The barbed wire which the ship brought was exclusively barbed wire shipped by Dulien;

That nobody else shipped barbed wire on that ship;

That all the barbed wire that came over on that ship was shipped by Dulien from Honolulu to here and there is no confusion between that barbed wire and anything else.

The Court: Under two bills of lading?

Mr. Bunn: Yes; under two bills of lading.

The Court: The straight bill and the order bill of Gonzalez & Blanco? [27]

Mr. Bunn: Yes, sir.

That early on Monday morning, July 29, Dulien

caused to be paid at Matson's office in Wilmington the freight on the shipment covered by the straight bill, 2,300 tons, and that Dulien's men received from Matson's office at Wilmington then and there on the morning of July 29th a freight bill stamped showing payment of such freight, on what I may here now call the Londono shipment, although it was called there the Dulien shipment;

That instead of bringing away with him from Matson's office at Wilmington the bill of lading which, under Londono's demand, if it had been a correct one, would have been the document required to be delivered to the bank, Dulien's man left the original bill of lading, that straight bill, which I will call here generally non-negotiable, at Matson's office;

That that is the document which these nearly four years has been lost, but was discovered one week ago last night in Matson's office at Wilmington;

That the messenger, or the man from Dulien's office, comes back from the Wilmington office of Matson, that is, comes into Los Angeles, goes to the Citizens Bank, presents Dulien's draft for \$214,000, presents to the bank the freight bill stamped paid, presents no bill of lading whatsoever;

That \$214,000 is that morning, when those documents came to Dulien—— [28]

The Court: That was Monday?

Mr. Bunn: That was Monday.

The Court: The 29th?

Mr. Bunn: The 29th.

The Court: The money was paid?

Mr. Bunn: The money was paid that morning.

But Mr. Londono did not at any time on July 29th go in the Citizens Bank; his instructions had been given on Saturday;

That in the morning, however, of Monday, July 29th, Mr. Londono, at the Clark Hotel preparing to keep an appointment with a doctor in Los Angeles, received a telephone call from the bank, from Mr. Moran;

That Mr. Moran was employed—I am now saying to the court what we will prove to the court—that Mr. Moran was a clerk employed in the foreign department of the bank;

That his immediate superior was Mr. Glenn Powers, who was co-manager or assistant manager of the department;

That Mr. Schroeder, with whom Mr. Londono had carried on his negotiations on the preceding Friday and Saturday, was the manager of the department;

That Mr. Schroeder may or may not have been in the bank when Dulien presented the documents, but at all events they were not presented to him and Mr. Schroeder did not see them;

That Mr. Glenn Powers, next in authority, I believe, was [29] temporarily away from his desk or the department and that Mr. Powers did not on presentation of the documents see them;

That they were presented by Dulien's man to Mr. Moran. Mr. Moran spoke and speaks Spanish and had come originally, I believe, from Porto Rico, but he had come here from New York;

That Mr. Moran, at the time in relation to the

delivery of the documents by Dulien, to the presentation of the documents by Dulien to the bank, which we cannot definitely fix, but still in the morning of Monday, the 29th, calls Mr. Londono on the telephone at the Clark Hotel and in Spanish talks to him and tells Mr. Londono that the shipping documents had been presented, that they showed a shipment of 2,300 tons, whereas Mr. Londono's letter of credit established on the preceding Saturday called for the payment for 2,000 tons, and asked Mr. Londono if that was all right, in substance, and that Mr. Londono, in Spanish on the telephone, told Mr. Moran that that was all right because he had agreed orally with Dulien that he would buy and pay for 2,000 tons and that he had established the credit on Friday with Mr. Schroeder for the 2,000 tons and that that was all right. That conversation ends. The phone was hung up.

That thereafter and still on the morning of Monday, the 29th, and before Mr. Londono had yet left the hotel to go to his doctor's appointment, the phone rings again and Mr. Moran is again on the phone and asks Mr. Londono if by reason of [30] that change in quantity it will be necessary to have first a letter from Dulien about the difference, and that Mr. Londono says no, that that is understood everywhere and that it is unnecessary. The phone hangs up and that is the end of that conversation. In substance that is all that was discussed in either or both of those telephone conversations between Mr. Moran and Mr. Londono.

That Mr. Londono goes to the doctor's office and

later in the day, late in the afternoon of Monday, still not having gone near the bank on Monday, goes to the dock, to Pier A at Long Beach, where he had been on Saturday afternoon and he had been unable to see any wire;

That by that time there has been commenced but is temporarily stopped, some unloading. In other words, there was no unloading going on while he was there, he was late, but that he saw some relatively small quantities of wire, there was no identification on it, he did not know whether it was wire for him or whether it was wire for somebody else, but there was wire there;

That on Monday, the 29th, the bank—first, the bank had previously on Friday and Saturday been informed that Mattoon & Company, brokers in Los Angeles, at the H. W. Hellman Building, would ship the wire in due time for Mr. Londono to South America, and the bank had been told that they could deal with Mattoon & Company as the forwarders who would send [31] it to South America on his behalf, yet Mr. Londono has not by that time signed any note for the \$54,000; it has all been by arrangement as I have stated. By the way, Mr. Londono had earlier in the spring of 1946 dealt with the Citizens National Bank.

* * *

That on Monday, the 29th, after the money was paid, the bank wrote a letter to Mattoon & Company and dated that letter July 29th, the date on which it was written, instructing Mattoon what to do for

the protection of the bank's interests and giving general instructions about the shipment of the wire for Mr. Londono;

That that letter was transmitted to Mattoon & Company and that it was received by Mr. Sweeney of Mattoon's office;

That on Tuesday, the 30th of July, Mr. Sweeney of Mattoon's office received a telephone call from the bank, from Mr. Schroeder himself, asking that Mr. Sweeney bring back as soon as possible (I am stating this in substance) the letter which had the day before been written and the enclosures or the documents that went with it.

Now on the 29th, Monday, the bank had transmitted this letter to Mattoon and the letter had stated that the bank was [32] enclosing a bill of lading No. LA-29. The letter did not enclose a bill of lading, but enclosed the stamped paid freight bill.

The Court: Exhibit D to the complaint.

Mr. Bunn: Yes, sir.

That on Tuesday, the 30th, when Mr. Schroeder calls and asks Mr. Sweeney to bring back the letter and the documents, Mr. Sweeney, in substance, says that he is busy and can't do it at the moment, and that he will do it, and he did not take it back on Tuesday;

* * *

That on Wednesday, the 31st of July, Mr. Sweeney goes into the bank, to Mr. Schroeder at the foreign department, accompanied this time by Mr. Londono, and returns the letter [33] dated July 29th and the stamped freight bill to Mr. Schroeder,

and that that letter is destroyed by the bank and that the carbon copy of that letter is destroyed by the bank.

Now I stated that it would appear that that letter contained a statement by the bank to Mattoon that the bank was enclosing the bill of lading. We will not be able to prove that that letter so stated, but the bank's second letter and the testimony of the bank's men will state that it so included a statement that it enclosed a bill of lading. Mr. Sweeney will testify that he does not know whether that letter referred to a bill of lading or not, but he does know that the document which accompanied it was a freight bill and a freight bill only.

Anyway, that letter was destroyed by the Bank and the carbon copy of the letter was destroyed by the Bank on the 31st, and on the 31st the Bank caused to be rewritten—let's say caused to be written—another letter to which they gave the date of July 29th, although it was written on July 31st, and that that letter did contain a statement that it accompanied or enclosed an original bill of lading No. LA-29, and that that letter was transmitted to Mattoon and was stamped, and the copy of it was stamped, by Mattoon's office with Mattoon's stamped receipt and signed by Sweeney as having been received and with enclosures;

That this is Wednesday, that as Mr. Sweeney and Mr. [34] Londono are in the bank on that occasion Mr. Schroeder takes them down to the main floor where the note department is and there are prepared for Mr. Londono's signature and Mr. Londono signs

a promissory note for \$54,535 and a collateral agreement describing the wire and another letter is written on that date to Mattoon, still another letter, with instructions from the Bank to Mattoon as to how to protect the Bank's interest in the wire and what to do;

That Mr. Londono leaves the bank, Mr. Sweeney goes back to his office, Mr. Londono goes to the Harbor, that is, he goes to the Moore-McCormack dock at Wilmington, not to Pier A at Long Beach, and at the Moore-McCormack dock at Wilmington he sees wire on cars which he then and there learns has been in the meantime, on Monday, Tuesday or Wednesday, removed from Pier A at Long Beach where the unloading of the SS White Squall was, to Moore-McCormack dock for his account to go to South America, and then and there on the 31st for the first time does Mr. Londono see any wire which can be identified to him as his wire, and that the wire is so badly rusted that he weeps, may I say, and he goes back to town. This is late Wednesday afternoon.

That Thursday morning August 1st, in downtown Los Angeles, he writes a letter to Dulien and he calls Dulien's attention to the fact that the 2000 tons of barbed wire which have arrived under bill of lading LA-29, which he refers to, [35] still not knowing that the Bank has not received a bill of lading, that is, not being cognizant of the fact that the Bank has not received the bill of lading——

* * *

(Short recess.)

The Court: Mr. Bunn?

Mr. Bunn: Your Honor please, I failed to say, and I was wrong when I said that Mr. Sweeney went back to his office and Mr. Londono went to the Harbor. Mr. Sweeney and Mr. Londono together left the bank after Mr. Londono had signed the note and the collateral agreement, and they had in that conference been instructed or requested by Mr. Schroeder at the bank to have the document, which was in the second letter referred to as bill of lading LA-29 but which was a freight bill, to have that paid freight bill endorsed on the back by Dulien, so in compliance with Mr. Schroeder's request Mr. Sweeney and Mr. Londono left the bank, and before Mr. Londono went to Moore-McCormack dock but en route there, went to [36] Dulien's office and told Mr. Stanley of Dulien's office of the bank's request, and in Mr. Londono's presence and that of Mr. Sweeney of Mattoon & Company, Mr. Stanley takes the paid original freight bill, puts it in his typewriter with the red ribbon and writes on the back of it, "This bill of lading endorsed in full to J. B. Londono for not more than 4,000,000 pounds, balance of shipment to be picked up by us. Dulien Steel Products, Inc., of California," and signs it "L. P. Stanley" and delivers it back then and there.

The Court: Who was Stanley?

Mr. Bunn: Mr. Stanley was an employee of Dulien's.

The Court: Where was that done?

Mr. Bunn: At Dulien's office.

The Court: In Londono's presence?

Mr. Bunn: In Mr. Londono's presence on Wednesday afternoon.

The Court: They went from the bank to Dulien's office?

Mr. Bunn: Yes, they went from the bank to Dulien's office to comply with the request of Mr. Schroeder at the bank that they have this document endorsed on the back.

The Court: Your position is that at that time Mr. Londono did not know, and was not told by the Bank, that the bill of lading in compliance with his instructions to them on a letter of credit had not been delivered to the bank?

Mr. Bunn: That is my statement and that is my representation, and that up to that time and beyond, as I shall show, the Bank still referred to this document in its transmittal letter also——

The Court: Is it your position that he did not know on July 31 that the Bank had paid Dulien the money on July 29?

Mr. Bunn: No, your Honor. I have been so close to this for so many years that I am making this statement from my recollection of my study of it, and rather than from the prepared statement because I would never get through reading the prepared statement.

On the 29th, Monday, after the Bank had paid the money, the Bank wrote a letter, which I failed to mention a while ago, to Mr. Londono, dated July 29th, stating (part of it I will read): "We have today made the following payment for your account," then it is blurred, "Dulien Steel Products," and

they set out the \$214,000. In other words, it is an advice from the Bank to him dated the 29th, on Monday, that they have paid and that this payment had been made against the following documents—that is the Bank's letter to Londono—one bill of lading and one invoice evidencing shipment of 2000 tons barbed wire, and Mr. Londono signed a copy of the letter, although no document was delivered to him until after the 30th of July.

In other words, Mr. Londono was not in the bank at all on July 29th. [38]

The Court: When he got that document which he signed, your position is that he did not then get the documents referred to as being enclosed or see them?

Mr. Bunn: That is true, that the documents were sent to Mattoon—whatever document was sent—the freight bill—was sent to Mattoon, and Mr. Londono was thereafter asked by the Bank to sign a receipt for the documents which were related in the letter.

* * *

Mr. Bunn: But at all events, on Wednesday, in Dulien's office, pursuant to the Bank's request, the reverse side of the freight bill is so endorsed as I have stated, and from Dulien's office then, still in complete ignorance of the fact that no bill of lading had been received by the Bank from Dulien's office, Londono goes to the Moore-McCormack dock and, for the first time, as I stated just before the recess, sees some wire which is identified to him as his, and is disappointed, to put it mildly;

That on the morning of August the 1st—— [39]

The Court: Is it your position that at that time was the first time that he observed the rusty and bad condition of the wire, or any of it?

Mr. Bunn: Or any of it identifiable as his.

The Court: I understand.

Mr. Bunn: Yes, sir, on July 31st at the Moore-McCormack dock.

That immediately, that is, the next morning because it was late in the afternoon, he writes a letter to Dulien, dated August 1st, and I think himself took it to the post office and registered it to Dulien calling attention to the fact that under the terms of the agreement it was understood that the barbed wire would be half galvanized and half black, both to be in good condition, and stating that upon Mr. Londono's inspection of a portion of the shipment already discharged it appears that there is greater than 50 per cent of black wire and about 50 per cent rusty or in poor condition, that "if the balance of the lot is in similar condition when discharged I must request the opportunity to renegotiate the original price paid for this merchandise," and signs the letter;

That Dulien received that letter in due course, dated August 1st (August 1st was Thursday);

That there is in process in one degree or another a strike or strikes down at the Harbor; [40]

That they unloaded for a few hours or on one day and then they stopped for a while, and several days elapsed in there before the wire was unloaded, all of it, but that within that time, or shortly there-

after, after Mr. Grinstein of Dulien gets the letter I have just referred to, he accompanies Mr. Londono to the dock at Long Beach and he, Mr. Grinstein, the manager, then sees the wire, sees its rusty condition, expresses his surprise about its condition——

The Court: Who?

Mr. Bunn: Mr. Grinstein—and suggests to Mr. Londono, and then writes a letter dated the 7th day of August to Mr. Londono, saying, “Confirming conversation you are to immediately start loading your wire, separating the rusty material, leaving same on the dock. As quickly as this is finished we will remove the 300 tons and will renegotiate the balance of the black when this material is removed.” This is signed Dulien Steel Products, Inc., by E. S. Grinstein, and dated August 7th.

That all this time Mr. Londono does not know that no bill of lading at all, particularly no order bill of lading, has been received by the Bank.

In the meantime, Gonzalez & Blanco, desirous of getting possession as soon as possible of their portion of that shipment on the White Squall, have a man, Mr. Russell Mather, working for them, who has been to Honolulu and has then and [41] there and in Honolulu, picked out what they wanted on the dock at Long Beach, supervising or at least directing the allocation from the ship and from the dock of wire for Gonzalez & Blanco;

That Mr. Mather is there practically all the time when the unloading is going on;

That Mr. Mather saw to it, and Mr. Mather will testify, that much of the wire was taken direct from

the ship to cars for Gonzalez & Blanco, some of it went from the ship to the floor of Pier A at Long Beach;

That at some time within those few following days, say within the week or 10 days after July 29th, somebody wrote with chalk somewhat in a semicircle around one large pile of mixed-up wire, that is, not segregated as to black or galvanized, wrote the word "Dulien" or "Dulien Steel Products," some indication in chalk of the name of Dulien, and at, around or near another large pile of wire on the dock the words in chalk "Gonzalez & Blanco";

That the wire had been actually loaded on the ship in Honolulu indiscriminately, that skips or pallets, as they call them, had been brought to the dock in Honolulu, and one pallet would have galvanized wire on it, another pallet would have black wire on it, but that it was put in the bottom of the ship indiscriminately;

That when the wire was unloaded from the ship—— [42]

The Court: That is, without discrimination as between black or galvanized and without discrimination as to whether or not it was under the straight bill of lading or order bill of lading to Gonzalez & Blanco?

Mr. Bunn: Yes, sir, with no discrimination anywhere.

That it was unloaded at Pier A, Long Beach, still likewise indiscriminately and piled up in tremendous piles there, good, bad, indifferent, black, galvanized, rusty, badly rusty, more badly rusty, and that there

was no distinction after those chalk markings were put there—and we do not know who put them there—no distinction between the composition of the two so marked piles, but that Gonzalez & Blanco began, early in the game, to pick out the better of the wire. They were entitled to 1500 tons out of a total shipment of 3800 tons. Londono was entitled to 2000 tons and Dulien was to take back the 300 tons.

That Londono on several occasions was down there and that when he saw what was happening, that Gonzalez & Blanco were taking the better of the wire out of the piles and he didn't know who had marked those piles, he on a day or so after the 12th day of August, which was Monday, rushes to his lawyer's office, and he had the same lawyer then unfortunately that he has now, rushed to his lawyer's office and cried out that they are letting Gonzalez & Blanco take the good wire, and his lawyer—this will be testified to by other [43] people than his lawyer—communicated with Mr. Banning of Matson's office;

That Mr. Londono's lawyer also communicated immediately with the San Pedro lawyer for Gonzalez & Blanco to find out what was wrong, and he will testify, and that Mr. Londono in that manner learned, and it will be shown here and testified to, that upon the discovery by Gonzalez & Blanco of the poor condition of this wire Gonzalez & Blanco had their lawyer in San Pedro immediately get in touch on the telephone with the War Shipping Administration office in San Francisco, Mr. Ball, who was

known to their lawyer, George Stephenson in San Pedro;

That Gonzalez & Blanco's lawyer acquainted Mr. Ball with what was happening and insisted, so Mr. Stephenson will testify, that they should be permitted to take good wire, that Gonzalez & Blanco held an order bill of lading, it was highly negotiable—and this is all in the conversation—and had bound itself to deliver clean, good wire to Gonzalez & Blanco and that they demanded the right to take it;

That Mr. Ball promised Mr. Stephenson that it would so be.

In the meantime, Mr. Londono's lawyer is communicating, I don't know at the same hour but within the day, with Matson's Los Angeles office, Mr. Banning, and Mr. Banning promises me that Mr. Londono will be permitted to select a cross-section, the same as Gonzalez & Blanco, and the next day Mr. Banning calls me and apologizes for having to reverse himself and to tell me that they will not be permitted to let Mr. Londono select and take out any good wire until Gonzalez & Blanco's order has been fully met and filled because, and he so tells me, Mr. Londono has no bill of lading and Gonzalez & Blanco do have a bill of lading, and that the reason Matson has to reverse its order is that the War shipping Administration office in San Francisco advised Matson that Mr. Londono has no bill of lading and Gonzalez & Blanco do have, and that Gonzalez & Blanco will have to be permitted to take the good wire from the whole shipment before Mr. Londono is per-

mitted to take anything except what is left over after the good has been taken from the bad because he has no bill of lading. That is the reason War Shipping Administration gave to Mr. Stephenson, Gonzalez & Blanco's lawyer, why they were doing it for his client and for refusing to do it for Mr. Londono.

That Mr. Londono weeps some more as he sees what is happening, but still does not know that there has been received no bill of lading. He has gotten that information from Matson. So then he begins an investigation to find out what they are talking about, and he goes to Mr. Sweeney of Mattoon & Company and asks Mr. Sweeney what documents the Bank turned over to Mattoon & Company on his behalf. [45]

May I interject. We contend, and shall prove, that Mattoon & Company were the agents of the Citizens Bank until the actual delivery to Mr. Londono and turning over into his possession, with the Bank's consent, of the wire, any portions of it, and that from the time the wire or any portion of it is actually released by the Bank to Mr. Londono, from that point on Mattoon & Company became and acted as the agent of Mr. Londono to ship to South America.

The Court: Your position is that Mattoon & Company's first obligation was to protect the Bank?

Mr. Bunn: Yes, sir, and the documents so show.

The Court: Very well.

Mr. Bunn: And that Mr. Sweeney produces, or shows the freight bill, which they have still had

before them as they made the trip down to Dulien's office and got the endorsement, and Sweeney said that is all he received, and then Mr. Londono comes to his lawyer's office and tells him that sad story and says, "This I understand is all the Bank received and this is not a bill of lading."

Then Mr. Londono and I, his lawyer, present ourselves at the foreign department of the Citizens Bank. That is on August 24th, on Saturday, August 24th. And on the preceding day, Friday, in further investigation to find out about the truth of Matson's statement that he had no bill of lading, Mr. Londono and I had gone to the Wilmington office of Koppel [46] Brothers and asked Mr. Koppel, who had been employed by Mattoon to do some segregating for the short time that segregation was permitted before Matson changed its order and told Mr. Koppel what has been brought to his attention, and Mr. Koppel says, "This is not a bill of lading, this is a freight bill only." That is on Friday, the 23rd.

So the next morning immediately Mr. Londono and I go to the bank and confront Mr. Moran with the situation that is so presented and Mr. Schroeder is not there at the time—Mr. Schroeder has, in the meantime, on August 2nd, gone on his vacation for a month, from which vacation he does not return until the day after Labor Day in September, which return date I think was September 3rd.

Mr. Powers, I believe, was not in the bank at the time of this last conversation. Anyway, Mr. Londono and I go and we tell Mr. Moran what we have learned and Mr. Moran insists then to us that he

paid on a larger bill, a larger paper than this freight bill that we showed him, and that that is not the document he paid on but that he paid on a bill of lading and it was larger than that.

Mr. Grinstein, in the meantime, has gone to Honolulu and there is nobody out at Dulien's office from whom any satisfaction on the situation can be obtained except Mr. Stanley, and for some days we await the return of Mr. Grinstein to find out more definitely if we can. [47]

Mr. Grinstein comes back and on September 4th Mr. Londono and I go to Dulien's office and, in Mr. Londono's presence, I acquaint Mr. Grinstein with the sad situation. He has been gone for days and days, and Mr. Dulien is gone, and Mr. Grinstein hears the story from me and says to us—I think I am quoting word for word now—"The money is ours," meaning Dulien, "the wire is yours," and that was as far as we got, except we said, "Mr. Grinstein, but did you pay on a bill of lading? We can't find that you did." And Mr. Grinstein calls Mr. Stanley in, the man who days before had written in red type on the back the endorsement on the freight bill, he calls Mr. Stanley in and, in our presence, Mr. Londono's and mine, Mr. Grinstein's and Mr. Stanley's, Mr. Grinstein confronts Mr. Stanley with the situation and Mr. Stanley conceded, stated that he had made a mistake, that he had left the bill of lading at Matson's office with Matson's man, was the language he used I believe, at Wilmington, and that he had presented to the Bank the freight bill only, that is, without a bill of lading,

and had been paid and that the payment had been made on Dulien's draft supported by the paid freight bill and without a bill of lading.

Then Mr. Grinstein said some things to Mr. Stanley that I don't need to say here. Mr. Londono will tell about that.

Then we went back to the bank and requested, I believe, a conference, and on a day in September, in the latter part, [48] we had a conference at the offices of the bank, with Mr. H. D. Ivey, Mr. L. O. Ivey, Mr. Fostvedt, vice-president; Mr. Emhoff of the foreign department; Mr. Schroeder, vice-president, acquainting them with the situation, and with Mr. O'Neil, Mr. Frank O'Neil, who was then acting in this matter as counsel for the Bank;

That it was then and there taken under consideration by the Bank as to what they would do with Mr. Londono's request as then presented, that he be permitted——

Mr. Londono: It was the 24th of August, not in September.

Mr. Bunn: He corrects me and says it was on the 24th day of August that we had the meeting with the Bank before we had received the confirmation from Stanley which I put out of order there.

On the 24th day of August then we asked that the Bank permit him—we did not then know, nor were we sure then, about the absence of the bill of lading—but that the Bank permit him to ship some of the wire to South America without being required, as the shipments were successively made, to pay the Bank a release price equal to the proper

proportion of its \$54,000 of the wire so shipped, so that he could stop dock charges and expenses and try to salvage something, and that the Bank took the request under consideration, and that the Bank very shortly thereafter reported to me—Mr. [49] Fostvedt will so testify, I think—that the Bank would so consent, and that it was understood and agreed that there would be no prejudice to the rights of any of the parties if we joined in that effort to salvage what we could salvage;

That some shipments were made within those weeks under that arrangement, that there had first been loaded for shipment 112 tons immediately after the arrival of the boat, and sent down to Moore-McCormack's dock before this arrangement with the Bank was made but after the money was paid;

That on September 10th—I am leaving out some details—but by September 10th there has been and was reduced to writing an agreement for the shipment and salvaging of approximately 1000 tons of the wire by Mr. Londono in South America and without prejudice to the rights of any of the parties, and that that agreement was incorporated in a letter which I directed over my signature as his attorney to Dulien and Matson and the Citizens Bank. [50]

* * *

April 18, 1950—2:00 P.M.

I erroneously stated that Mr. Schroeder, vice-president of the Bank in charge of the foreign department, was present at the conference attended

by Mr. Londono and me and Mr. Frank O'Neil, advising the Bank, with certain bank officials, on the 24th of August. Mr. Schroeder, as I had previously stated here this morning, was on his vacation from the 2nd or 3rd of August to the 3rd, I believe, of September. Mr. Schroeder was not present in that conference we then had on the 24th with certain officials of the bank. And it is my mistake in recollection this morning.

* * *

I wish, at this time, to state that we will show that all [52] movements of wire, all exercise of dominion over wire by Mr. Londono prior to the conference with the bank officials on August 24th, was without knowledge on Mr. Londono's part that the Bank had not received a bill of lading.

The Court: That is to say, that August 24th is the first date that Mr. Londono found out the Bank had not received a bill of lading?

Mr. Bunn: Not exactly, if your Honor please. That by the time of that meeting Mr. Londono had been told, and was suspicious of the fact that the Bank had not received a bill of lading, but not until September 4th that he knew from Mr. Stanley, who had made the payment, but that at all events Mr. Londono up to and prior to that morning of August 24th had not known. He had been told, as I stated this morning, Matson had reported to me that the reason that they wouldn't let him select was because he didn't have a bill of lading. [53]

* * *

But the point I want to make now, if I may, is

that from and after the 24th day of August, on which date was held the conference with the officials of the bank, including the president, Mr. H. D. Ivey, from and after that time there was no movement of any of the wire by Mr. Londono without the knowledge and consent of the Bank and Dulien, and without the knowledge of Matson.

* * *

The amount of wire ultimately received by Mr. Londono was 81 tons short of 2000 tons. It is set up in detail in the complaint. We will not be able to show where the 81 tons went specifically. We will show that during the course of the disposition, as I call it, of salvage by Mr. Londono, [54] which spread over some months, there was removed by Dulien some wire. Under the writings Dulien was at liberty, if the shipment had been complete, 2300 tons, to remove 300 tons. How much Dulien removed we may not ourselves, independent of Dulien's witnesses, be able to prove. But at all events there was released to and disposed of in one manner or another by Mr. Londono 1919 tons, which is 81 tons short of 2000;

* * *

Mr. Bunn: Now, after it was believed by Mr. Londono after September 4th that the Bank had received no bill of lading, a course of conduct was planned, outlined by his counsel and carried on with full knowledge of all parties, under which course of conduct every effort was made to dispose of the

wire then on the dock for whatever could be obtained for it;

That Mr. Londono, himself, remained here during those [55] weeks;

That he made every reasonable effort to find purchasers for it at, may I say, any price but not meaning that it would have been sold for less than anybody would have paid for it, but that in our inability to make a proper disposal of it at anything like what all parties considered a proper figure, there was received from Gonzalez & Blanco, who had received the other portion of the wire, a suggestion that if we would let them pickle some of this wire, that is, have it treated, cleaned, a fairly expensive process, they would then determine what they might pay for the wire and take it off our hands.

With the full knowledge and consent of Dulien and the Bank, and with the knowledge of Matson, we then let Gonzalez & Blanco take 25 tons for experimental purposes, or pickling, cleaning purposes, for which 25 tons Gonzalez & Blanco agreed to pay \$65 per ton.

They took the 25 tons, they had it pickled, they reported back to us all that they would not pay any more for the approximately, we thought, 1000 tons remaining on the dock. Your Honor will appreciate the fact that we couldn't tell by looking at it exactly how many tons was in the big pile. But they said that they would pay \$51 per ton.

By agreement then, by written contract, the Bank and Dulien agreed, and Matson knew all about it

and did not object, that Gonzalez & Blanco would take the remainder of the wire at [56] \$51 per ton.

Gonzalez & Blanco thereafter had difficulty in moving the wire from the dock, strikes were on from time to time, the charges were running up, and they agreed also that by reason of delays and moving it that they would pay \$51 per ton and \$1000 additional in cash to cover some of the dock charges down there.

They had trouble moving it, as I say, and by, I think, the early part of December they were able to move—no, he had a deadline on the contract, that unless they could move it by a certain date in December that they would pay anyway. The date came and had to be extended, I believe, on account of strikes, but the point I want to get over is the fact that after Gonzalez & Blanco had moved a total of some 700 and some-odd tons, they reported to us that they wouldn't take the balance of it, that it wasn't even worth pickling, and they wouldn't take it at any price. That is what they said then.

We got together then, we lawyers and parties, and by that time Mr. Londono, I believe, had gone to South America but he left power of attorney with me to move the stuff if we could and, to make a long story short, there was about 134 tons of it that Gonzalez & Blanco wouldn't take.

So I obtained an agreement from Dulien and the Bank, and gave Matson notice of it, and we let Gonzalez & Blanco out of [57] their contract of \$51 a ton, as far as that part of it is concerned, likewise without prejudice to any of our rights;

That thereafter, as late as the spring of 1947, this wire was still down there, nobody wanted it, nobody was willing to pay the dock charges on it, some of it had been moved from a pier at Long Beach to another place over in Wilmington, and so I called together the lawyers, and Mr. Dasteel representing Dulien went there with me, the Bank declined to go but had knowledge of the trip, and we looked at what was left and it was then agreed, and the agreement was thereafter executed, I mean carried out, and the Bank agreed to it, that that remaining amount there was no good to anybody would be sold on a new deal to Gonzalez & Blanco for \$4.50 per ton;

That there was still some 25 tons, I believe, that had to be moved off the dock, and it was moved and sent to South America, or Mexico or someplace, and we will show exactly what was obtained for that, but that was with consent of all parties without prejudice, except that Matson didn't consent, but they knew about it.

I failed this morning to state that not only was the Bank told by Mr. Londono what his purpose was in the purchase of this wire, and where he intended to send it, but that Dulien likewise was told and knew of his purpose in the conversations that he will testify to on July 11th and July 12th;

That there is a difference in the claims of the [58] plaintiff against the several defendants in that claims made against Dulien and the Bank are not for the losses occasioned on account of the difference in the value, the price paid of \$107 per ton and

the market price at Los Angeles of the wire that was received, but also for the loss of anticipated profits because of the fact that both Dulien and the Bank had been informed by Mr. Londono of his plans to send it south and knew the circumstances in regard thereto, but that no claim could properly be made or supported against Matson or the Government on that account because there was no representation by Mr. Londono to Matson or the Government in regard to his intention and purposes in selling, and that I think is the key to the question of recoverable profits. [59]

* * *

In other words, Matson in its answers to interrogatories says that the bill of lading was dated the 12th, it was actually issued the 19th, but that as early as the 10th Castle & Cooke, who they stated elsewhere in their answers, was Matson's agent, was advised that the wire held by Inter-Island was more or less damaged by rust.

* * *

Now it will develop and be shown in this trial that Mr. Dulien himself in Honolulu had had much of the wire treated with diesel oil to cover up the rust, that the men who treated it were told what to do. The depositions Mr. Laven took in Honolulu will so show, that they were told to do it thoroughly, that they were told that if any rust appeared after oiling it they must oil it again; that Mr. Dulien himself in Honolulu [61] told them that.

But the depositions will also show, particularly

the deposition of one witness—two witnesses—that after having made that effort to cover up the rust on the wire, that the rust was still visible. Different witnesses will give different statements in those depositions about the extent of it which was visible.

But other witnesses in depositions that I took over there, an independent shipping agent who saw the wire, will testify that it was not concealed and that you could tell by looking at a pile of it that it was rusty.

So Matson under those circumstances—Matson's agent under those circumstances—issues, we believe, a clean bill of lading on that merchandise. The law requires that the carrier show exceptions on a bill of lading, indicating the extent to which the merchandise therein described is not in apparent good order or condition, and the bill of lading form states that it is in good order and condition except as otherwise herein noted.

Matson made no notation of exceptions. Therefore the representation made by what we believe to have been a bill of lading that they issued was affirmative and positive that the goods were in good order.

The Court: Is it your position that the obligation of Matson as a shipper is the same under a straight bill of [62] lading as it is under an order bill of lading, that is, to indicate the exceptions to the apparent good order and condition?

Mr. Bunn: I think the law requires that they show exceptions on either class of bill of lading.

The Court: Very well.

Mr. Bunn: But the practice, and arising out of the fact that an order bill of lading is a highly negotiable document, beyond which nobody needs to look and upon which anybody in the commercial world is at liberty under the law and practice to depend, because that is the case with an order bill and that is not the case with a straight bill, the carriers themselves regard straight bills as of little, if any, importance, but order bills of the utmost importance.

The Court: Your position, nevertheless, is that the law requires them to give the same importance to that statement in either a straight bill or an order bill?

Mr. Bunn: The law requires that they note exceptions.

The Court: The same importance in one as the other?

Mr. Bunn: There is no distinction that I know of. [63]

* * *

Mr. Bunn: We will show that after the ship got here that the unloading was done under the direction of Matson, that a stevedoring concern at Long Beach, the Transmarine Terminals, actually unloaded, that Matson gave instructions to Transmarine Navigation Company, and Transmarine gave instructions to Marine Terminals, and that Matson at all times had the last word, let us say, as to what to say about the actual disposition of the wire to the owners. [65]

The Court: As to what went on and what came

on and when and where it went afterwards, is that your position? That Matson had charge of what went on the boat?

Mr. Bunn: Yes, sir.

The Court: And how it went on, that is to say, the channels through which it went legally, and what came off and where it sent afterwards?

Mr. Bunn: That is my understanding; yes, sir.

And in line with that, we will prove that in the midst of this controversy I talked about this morning of the selection, or the right to select by Gonzalez & Blanco in priority over Mr. Londono, that Matson Navigation Company, through its Mr. Ford at Wilmington, actually wrote a letter of instructions to Transmarine Navigation Company, instructing Transmarine to see to it that Gonzalez & Blanco's 1500-ton order was filled first before Mr. Londono was permitted to select. [66]

* * *

That the wire was so bad that some of it could be broken by hand, and I shall bring into the courtroom, if the court please, four rolls of wire, hundred-pound rolls, if I am so permitted to do—— [67]

* * *

That the negligence of the Bank in the mistaking of the freight bill for the bill of lading, combined with the negligence of Matson Navigation Company in issuing a, what we call—they take offense at me for this—a false bill of lading to result in the damage to Mr. Londono; that however, if the Bank had followed Mr. Londono's instructions——

The Court: If they had followed the contract.

Mr. Bunn: Yes, if they had followed the contract, which was the letter of credit, and had done what under the terms of that letter of credit in accordance with all the shipping and commercial customs throughout the world, Mr. Londono would have still had his money because the Bank would have refused when Dulien's man came there with the paid freight bill to pay him a dime, and the Bank would have said, "Where is the clean on board order bill of lading," and there wasn't any, and Dulien couldn't have supplied one, I concede now, at least we don't learn of any in existence, the only bill of lading that we have been told about in any of these proceedings of which we have been shown any copies, is not the kind of a bill of lading which was under the contract required, and Mr. Londono would have still had his money. [69]

* * *

Now we will show about the wire that the wire was viewed here by almost everybody—as the Mexicans say, "todo el mundo"; by all the world—that people came to look at it, that it was checked, appraised, examined by more than one concern, that Toplis and Harding, sub-agents for Lloyd's, but in their individual capacity, at one time in August examined the wire, made a report on the condition of it from a cursory examination and without taking it out roll by roll, that the reports were uniformly terrible, that there was——

The Court: You mean the reports were uniformly terrible?

Mr. Bunn: I mean that the reports were that the wire was terrible, although they didn't use that word.

But Toplis and Harding's man who made the report will testify that he could break some of it with his bare hands. The wire was so yellow with rust that I am ashamed to produce it as barbed wire into this courtroom, but I shall.

That Mr. Londono, in every conceivable fair effort to reduce the loss, after there was nothing else for him to do, and after his money was gone and when nobody else was willing [71] to exercise any dominion over it, and they all in substance said, "Mr. Londono, it is on the dock and it is yours," still made every possible effort to get as much for the wire as he could, keeping everybody at all times informed, and that as a practical proposition he had the approval of the defendants in so doing, although, as I stated so many times, without Matson's actual consent but without any objection on Matson's part.

That his losses are set out in the complaint, and although not set out in the complaint the amount that he actually received upon the shipment to South America, that is set out in his answer to the Bank's interrogatories, my contention having been, and heretofore having been expressed before the court, that the measure of Mr. Londono's loss was twofold, the difference in the price paid and the value at Los Angeles, the place of delivery, and that it was unimportant what he may have obtained for it elsewhere, but in the answering interrogatories

as directed he set up that he received in South America \$75 per ton f.o.b. Los Angeles, that is, with the shipping expenses from Los Angeles to Colombia paid by the purchaser, and that his losses were of course the calculated differences all the way through. [72]

* * *

That Matson put no tags of any kind on the wire or caused to be put on the wire as it was loaded in Honolulu and, as I said this morning, loaded it indiscriminately as to which bill of lading it was under.

The Court: Do you contend that they had a legal duty in that respect?

Mr. Bunn: I think they did have a legal duty to identify it for each bill of lading. [73]

* * *

Mr. Bunn: I failed to comment this morning on the fact that in the early days of this situation, that is, July 29, 30, 31, or within that week, Mr. Sweeney of Mattoon & Company, to whom had been written the letter of July 29th and the rewritten letter dated the 29th but written on the 31st, Mr. Sweeney had written a letter to the M and M Transfer Company giving them certain instructions and referring to a bill of lading attached, and Mr. Sweeney did not have any bill of lading, nor did he attach any bill of lading to that letter. Mr. Sweeney himself will testify as to the error which the use of the word "attached" in that form con-

sisted of. In other words, there is a tragedy of errors. [76]

* * *

The Court: But what I am trying to get at is that you regard Dulien and the Bank as jointly and severally liable in the principal sum of \$191,000 or—— [77]

Mr. Bunn: \$197,552.

The Court: Is that right?

Mr. Bunn: Yes, sir. And that Matson and the Government—— [78]

* * *

Opening Statement on Behalf of Defendant Dulien
By Mr. Dasteel:

* * *

The defendant Dulien does not deny that some of this wire was rusty and covered with dust. I think the evidence will also show that where rust is referred to that it simply means a red dust that is peculiar in Honolulu. The dust is red and very often mistaken for rust.

Furthermore, the evidence will show that this wire was oiled at Honolulu by depositions that were taken over there, and we will show that this oil was not placed on the wire for [83] the purpose of hiding the wire from rust so that it wouldn't show, but for the purpose of preserving the wire, for the benefit of the plaintiff.

Counsel stated that he is going to bring some rolls of wire into court. I assume that he is going to pick out four of probably the worst types that

he could possibly find, and at this time if I am not out of order I would like counsel to also bring in a few rolls of the good wire, so that this court may be properly informed of the fact that all of the wire was not rusty. [84]

* * *

The Court: You mean that your factual position will be that this deal with Londono was concluded before the wire was on board the "White Squall" and at sea?

Mr. Dasteel: No, your Honor. Our position is that Mr. Londono purchased this wire while in transit.

The Court: While at sea?

Mr. Dasteel: Yes, while at sea. [85]

* * *

The Court: Let me see now. You say the 300 tons which was rejected. I had understood from the pleadings and the opening statement of counsel that it was by mutual agreement that it would be 300 tons less.

Mr. Dasteel: Yes.

The Court: That it was not a matter of rejection by Londono.

Mr. Dasteel: Well, the original agreement, if your Honor please, called for 2700 tons.

The Court: I understand. [87]

Mr. Dasteel: And then it was reduced to 2000 tons. There were 2300 tons on board, and a conference took place between the plaintiff and the defendant—

The Court: Before the arrival of the wire.

Mr. Dasteel: Before the arrival of the wire.

The Court: And before the letter of credit was discussed.

Mr. Dasteel: Yes.

The Court: So it was a mutual agreement.

Mr. Dasteel: The mutual agreement was for 2000 tons, and the 300 tons was picked up by Dulien.

The Court: That is, 300 tons in excess of 2000 tons.

Mr. Dasteel: That is right, your Honor.

The Court: Not 300 tons of the 2000 tons?

Mr. Dasteel: No, in excess of the 2000.

The Court: Very well.

Mr. Dasteel: Now there has been some question about the mysterious bill of lading. Counsel I think from the Bank, and I think Mr. Bunn, the plaintiff's counsel, and myself interviewed Mr. Stanley who at that time was the office manager of Dulien, for the purpose of endeavoring to determine what happened to the original bill of lading and, frankly, we could not find out exactly what did happen to that bill of lading.

I have interviewed Mr. Stanley on many occasions and if he were brought here, and if it is desired by any of these [88] defendants or the plaintiff, I think we can produce Mr. Stanley and his testimony will be that he doesn't remember exactly what documents he took to the bank.

* * *

Mr. Dasteel: Yes, your Honor. And we have no

objection to having him come here, but he will testify, and the evidence will show that Stanley's testimony will be, that he took some documents down to the bank, that he picked up this check and then thereafter, whether at the bank or at his office, he doesn't recall, he did sign the back of the freight bill which is marked Plaintiff's Exhibit D attached to the complaint, and on the reverse side of the freight bill: "This bill of lading [89] endorsed in full to J. B. Londono for not more than 4,000,000 pounds (which is 2000 tons), balance of shipment to be picked up by us. (Signed) Dulien Steel Products, Inc., of California, L. P. Stanley."

Counsel I believe brought to the court's attention the fact that the format of the freight bill is very similar to the bill of lading. Now whether or not Stanley had a bill of lading, we are not prepared to show. We admit that we cannot produce any evidence to show whether he did or did not have the original bill of lading. We do not consider that greatly important to the defense of the defendant Dulien.

* * *

Opening Statement in Behalf of Defendant Bank

Mr. Diether: May it please the court, I hope that the same stipulation will apply to my remarks as applied to the remarks of Mr. Bunn, namely, whatever I state to be a fact [90] will merely be what the defendant Bank believes the evidence will show.

The Court: Surely.

Mr. Diether: And I am not stating it as a positive fact.

* * *

I shall refer to the plaintiff as "Londono," to Matson Navigation Company as "Matson" and to the two Dulien Corporations as "Dulien" and to the defendant Bank as merely the "Bank." [91]

* * *

The Bank does not contend it received a clean order bill of lading for 2000 tons of wire shipped from Honolulu to Los Angeles, but the Bank does contend that the plaintiff modified his instructions prior to the payment of the letter of credit by the Bank, and that modification was oral. He instructed the Bank to pay the letter of credit on receiving a clean straight bill of lading for 2300 tons and the Bank contends that it received a clean straight bill of lading for approximately 2300 tons.

Your Honor will note from Mr. Bunn's remarks that he said it was approximately 2300 tons. The tonnage or the weight on the bill of lading is in pounds and I believe it is some 52 pounds less than 2300 tons.

The Bank was requested by the plaintiff—

The Court: If I understood Mr. Bunn's statement correctly, he did not concede that the Bank had received any bill of lading.

Mr. Diether: That is correct. [94]

* * *

The Court: Your position is that you did receive it?

Mr. Diether: Our position is that we did receive a straight clean bill of lading for 2300 tons pursuant to the modification of instructions which Londono gave to the Bank prior to the time that the letter of credit was paid.

The Court: Very well. [95]

* * *

Mr. Diether: There is no question, I believe, but what Matson did issue in Honolulu a clean straight bill of lading for approximately 2300 tons of wire.

The Court: What do you mean by "clean"?

Mr. Diether: "Clean" is without any exceptions as to the condition of the wire. I think that a bill of lading which notes on its face, or if it were noted that the wire was rusty or had some defect, that that would not be clean, but where there are no exceptions then it is referred to as clean, and in this particular case the bill of lading that was actually issued was clean.

The Court: I understand.

Mr. Diether: This bill of lading was not found, as I understand it, until April 11, 1950, which was a week ago. Prior to that time I believe all the parties had denied that they had any knowledge of its existence. Of course ample [96] time did not exist at that time to take advantage of any of the advantages under the rules of Civil Procedure, consequently we have no knowledge of under what circumstances it was found or any circumstances as to how Matson received possession of that bill of lading. That will have to be developed during the course of the trial.

But the position of the Bank is also that regardless of whether the Bank received a bill of lading is immaterial in view of the acts and conduct of the parties in this case. [97]

It is the Bank's further contention that if the Bank did not receive a bill of lading, plaintiff received the same wire, the same quality, no better or no worse, the same quantity, no less or no more, than he would have received had the Bank received a bill of lading.

The Court: A clean order bill of lading?

Mr. Diether: Correct, your Honor.

The Court: Or a straight bill of lading?

Mr. Diether: A clean order bill of lading.

The Bank has alleged certain affirmative defenses. The [99] first is the one that the complaint fails to state a claim against the Bank upon which relief may be granted. Your Honor will recall that that was urged in the motion of the Bank to dismiss, and in that particular motion I believe the Bank only urged one of the grounds which we will urge at the time of the trial, namely, at that time we were urging that the letter of credit guarantee which Mr. Londono signed released the Bank from liability for not receiving the bill of lading as required by the letter of credit.

But there are certain other provisions in that letter of credit guarantee which we think are applicable, namely, that the Bank shall not be responsible for the character or condition of the wire, shall not be responsible for any breach of contract between the seller and the purchaser, that the Bank

shall not be responsible for the quantity of the wire, also that the Bank shall not be responsible if the instruments are not presented to the Bank at the time that the letter of credit is negotiated. Those particular features of that letter of credit guarantee we wish to urge during the course of the trial. [100]

* * *

Londono by his course of conduct, which we believe he has admitted by his opening statement and by his course of conduct, has elected to accept and keep the wire under Section 1789, Subsection 1(b) of the Civil Code, that having once [102] made such election he is bound by that election and the legal consequences thereof.

The Court: Suppose he had not done so, would it not have been his duty to have done whatever he could to mitigate the damages?

Mr. Diether: I think not as against the Bank.

The Court: Against anybody? In other words, as Mr. Bunn said, somebody said, "Well, it is our money and your wire." Suppose he had refused to accept it, would it not have been his duty anyhow to go in and see what he could do?

Mr. Diether: I don't think so, not if he had refused to accept the wire.

The Court: Of course after his money was paid by the Bank and he had refused to accept the wire, what would he have done, just let it lay there and rust?

Mr. Diether: Then there would have been no question if he could have shown that the Bank had

not paid pursuant to the instructions and he rejected the wire because it did not comply with the letter of credit.

The Court: Then would not the Bank be in here saying that they paid the money and passed the title and that he did not do his duty in taking the wire and trying to sell it and thus mitigate the amount of damages?

Mr. Diether: If your Honor please, there is a very definite line of conduct for a purchaser to follow if he claims [103] that there has been a breach of contract, and that line of conduct is set forth in the Civil Code under Section 1789, and that conduct which the plaintiff has followed in this case was to accept the wire, and we claim that he accepted the wire knowing the condition of the wire, and also knew, or he ought to have known, the character of the documents upon which the Bank paid the letter of credit, and under those circumstances we think that he is estopped from claiming any damages as against the Bank. [104]

* * *

April 19, 1950.

The Court: Your position is that as between Londono and the Bank the question turns on whether or not he should or should not have received a bill of lading?

Mr. Diether: That is one point, among many.

The Court: Well, that is your main point? [112]

Mr. Diether: Well, I should say that is one of the principal points.

Another one is the fact, as I mentioned to your Honor yesterday in these affirmative defenses, namely, that Mr. Londono executed this letter of credit guarantee which he, by virtue of that agreement, released the Bank from any liability for the acts which he is here complaining about.

The Court: What I am getting at is this: So far as the bill of lading is concerned, your position is that it does not make any difference whether the wire was rusty or what the condition was.

Mr. Diether: That is correct, or whether he received a shortage or not. [113]

* * *

Immediately after that conference between Mr. Londono and Dulien on Friday afternoon of July 26, Mr. Londono went to the bank and informed them that he was purchasing 2000 tons of wire from Mr. Dulien. All the negotiations were in English.

The Court: That is the first time the Bank ever heard of Dulien?

Mr. Diether: The first time the Bank ever heard of Dulien. And said that he wanted to purchase a letter of credit for \$214,000. He wanted to cash in his letter of credit of \$160,000 which had been issued to him in June, and then he said he wanted to borrow the balance, which was some \$54,000, to make up the difference of \$214,000.

At that time the man he talked to was Mr. Schroeder, a vice president of the bank and in charge of the foreign department. Mr. Schroeder

informed Mr. Londono that he would have to discuss it with the senior officers to see whether such a loan would be approved. Mr. Londono at that time had a very high credit rating with the bank by reason of his [115] previous transactions with the bank.

* * *

Also let me go back. On July 27th, which was Saturday morning, the application for the letter of credit was prepared. It was prepared by Mr. Schroeder, the man whom Mr. [116] Londono talked to the previous day. There was no discussion between Mr. Schroeder or Mr. Londono about any bill of lading. He didn't mention anything that he wanted a clean, straight or any kind of bill of lading. It was not mentioned. And that particular form of application which the bank uses provides a place to insert the documents to be furnished upon payment of that letter of credit.

The bank inserted in that application at its own instance the requirement that Dulien furnish a clean order bill of lading for 2000 tons of barbed wire for its own protection.

The Court: Well, it was prudence on their part, having 1000 tons or \$160,000 involved on 1000 tons shipped to Colombia.

Mr. Diether: Not only for that, but for the loan which they were then making to Mr. Londono. And it was at their instance that that requirement was inserted, and not in the instance of Mr. Londono.

The Court: Did he have any less protection for that reason?

Mr. Diether: I beg your pardon?

The Court: Would he have any less protection because the bank put it in there? [117]

* * *

After that application was signed and the letter of credit guarantee, the letter of credit was issued and Mr. Londono took the letter of credit and went down and handed it to Dulien. I believe he saw Mr. Grinstein and he was then informed that the boat had already arrived the previous day, and then he went down to the dock, as Mr. Bunn has previously stated.

Upon July 29th, which was Monday morning, Dulien presented documents to the bank for payment of this letter of credit. We believe that the evidence will show that at that time Dulien presented a straight bill of lading for 2300 tons, prepaid freight bill, Dulien's invoice for 2000 tons of wire, and draft for \$214,000 and a letter of credit.

An employee of the bank by the name of Moran was on duty at that time, and he accepted those documents for checking. Moran immediately discovered that there were two discrepancies, that the documents called for 300 tons more wire than was specified in the letter of credit, namely, 2300 tons. He also observed that the bill of lading was straight rather than order.

He immediately got in touch with Mr. Londono on the telephone and informed him of these discrepancies.

Mr. Londono informed him that he had already made [118] arrangements with Mr. Dulien that he was to take 2000 tons of a 2300-ton shipment and that that phase of the transaction was perfectly satisfactory, and authorized him to accept the documents.

He also told him that he waived the order bill of lading and to accept the straight bill of lading, and he authorized the bank to go ahead and accept those documents.

He told Mr. Moran at that time that the White Squall, which was the name of the vessel on which this wire was brought to Los Angeles, had arrived on Friday afternoon, that he was very anxious to get these documents accepted, and that he wanted to get this wire reshipped to Colombia without any further delay. [119]

* * *

After the documents were received a letter was prepared by the bank to Mattoon in which it is stated that they are enclosing this bill of lading and stating also that the shipment, or the bill of lading, was consigned to Dulien showing on its face that it was a straight bill of lading and not order. [120]

* * *

That letter which was sent by the bank to Mattoon also specified that the shipping documents were to be delivered to the bank for delivery to Mr. Londono.

The Court: What shipping documents?

Mr. Diether: Well, for reshipment to Colombia.

The Court: Reshipment?

Mr. Diether: Yes. I beg your pardon, I should have pointed that out.

In other words, I think it was also pointed out in that letter that Mr. Londono was intending to reship this wire to Colombia and that we would give them instructions in that regard but that the shipping documents for reshipment were to be delivered to the bank for delivery to Mr. Londono.

The Court: I suppose if the evidence shows that, you will explain at the proper time why the bank sent the bill of lading over to Mattoon?

Mr. Diether: Pursuant to instructions from Mr. Londono which he gave to the bank orally.

The Court: To send the bill of lading to [121] Mattoon?

Mr. Diether: Yes, sir.

The Court: Why did Mattoon have to have the bill of lading?

Mr. Diether: They were to arrange for the reshipment to Colombia.

The Court: Why would they have to have the bill of lading?

Mr. Diether: They didn't have to have it.

The Court: They did not?

Mr. Diether: And they didn't use it. It was never used. It was never demanded by Matson and was never requested by Matson and was never at any time submitted to—I should put it this way——

The Court: You have answered the question.

You said that you sent it to him because Londono had told you to do it.

Mr. Diether: That is right.

In further answer to that I should say that we believe that there will be some evidence to the effect that Mattoon subsequently sent that bill of lading to Matson but that I understand Mattoon's testimony is that they did not deliver any documents to Matson in order to secure delivery of the wire for account of Londono.

The next day, which was Tuesday, Mr. Schroeder learned that the transaction had been consummated on July 29th, and he observed of course that the bill of lading was for 2300 [122] tons and it was a straight bill of lading to Dulien. He then called Mattoon's office——

The Court: Who was this?

Mr. Diether: Mr. Schroeder, who was the vice president of the bank, learned that the letter of credit had been paid the previous day and that the bill of lading was for 2300 tons and that it was straight and that Dulien was the consignee.

The Court: I thought you said you were going to have somebody show that somebody will testify that they saw the straight bill of lading.

Mr. Diether: We believe that Mr. Moran will so testify that it was delivered.

The Court: Not Mr. Schroeder?

Mr. Diether: Mr. Schroeder had nothing to do with the checking of these documents, but he being in charge of the office learned through his employees that this transaction had been completed.

He then called Mattoon's office to request them to secure an assignment on that bill of lading to show that Londono picked up 2000 tons.

* * *

The next day was Wednesday, July 31. On that day Londono and Mr. Sweeney came to the bank and Mr. Londono at that time signed the note for \$54,535. He also pledged the 2000 tons of wire as security for the loan.

* * *

At that same time Mr. Schroeder handed to Mr. Londono this letter which Mr. Bunn referred to, stating that the bank had paid the letter of credit and that the bill of lading was delivered to Mattoon & Company.

* * *

Mr. Londono and Mr. Sweeney then went to the Harbor, and [124] on their way they stopped off at Dulien's office, and this document which they delivered to Dulien at that time was endorsed as Mr. Bunn has called your Honor's attention to.

The document was a freight bill. It had been in Mr. Sweeney's hands since Monday and Mr. Londono admitted seeing it, and not only that, but had seen the letter of July 29 on that day and I believe at that time, after it had been so endorsed, it was turned over to Mr. Londono and he kept it in his possession until he had some discussion, sometime the latter part of August, with one of the parties who was segregating the wire for him.

In other words, this supposed bill of lading or, I should say, the document which Londono claims the bank paid this letter of credit on was in Mr. Londono's hands from the date it was signed by Dulien, which was July 31, until sometime the latter part of August.

The Court: Before that it was in the bank's hands?

Mr. Diether: It was in the bank's hands about a part of July 29 and after July 29.

* * *

In other words, we claim that that is one of the documents which was delivered to Mattoon with the letter of July [125] 29.

Now with respect to the delivery of wire to Mr. Londono. On July 30, which was Tuesday, Mattoon, prior to the receiving of the written instructions from the bank relative to the reshipment of this wire, issued orders to a trucking company to pick up wire at the Matson dock on account of Londono for reshipment to South America.

On that same date Mattoon issued an order to Matson to deliver 2825 rolls of wire to said trucking company for account of Londono. And on July 31, which was Wednesday, 740 rolls of wire were picked up by Londono, picked up by Mattoon's instructions, at the Matson dock and were taken off to the Moore-McCormack dock, and in the afternoon of that same day Mr. Londono, with Mr. Sweeney, observed that wire over on Moore-McCormack dock and they discovered at that time

that the wire was not what they thought it should be.

Mr. Londono went back to Los Angeles with Mr. Sweeney and they prepared a letter in Mr. Sweeney's office to Mr. Dulien, telling him that the wire was not as he thought it should be, and Mr. Sweeney on that same day, July 31, Wednesday afternoon, gave instructions to the trucking company to immediately pick up that 740 rolls of wire and take it back to Matson's dock, which was done the next day. So all of the wire that had been taken on the 31st was again returned to Matson's dock and they had all of it from July 31 until August 7. It [126] was all there. [127]

* * *

The bank had no knowledge that there was any claim on the part of Londono that it had paid on a freight bill rather than a bill of lading until August 24th.

When Mr. Bunn and Mr. Londono came to the bank on that day, the bank immediately inquired of Dulien whether they had delivered a bill of lading to the bank, and were informed that they had so delivered a bill of lading. [130]

* * *

Now, if your Honor please, I want to state very briefly the bank's contentions. We believe that the letter of credit guarantee signed by Mr. Londono at the time he purchased the letter of credit released the bank from all liability for its [132] acts which he complains of here. That not only applies

to the receipt of a bill of lading, but it also releases the bank from any defect in the wire or any failure to deliver the quantity of wire called for, or failure of bill of lading to accompany the draft at the time of the negotiations.

* * *

The bank contends that Londono accepted and kept the [133] wire with full knowledge of the condition of the wire, that he knew or ought to have known the character of the documents the bank received at the time they paid the letter of credit.

* * *

Londono had knowledge of the freight bill in his possession from July 31 until sometime in August. He knew or he ought to have known by that time that it was a freight bill and not a bill of lading. [134]

* * *

The bank deals in documents, not in goods or merchandise. [135]

* * *

We believe that the evidence will show that the bank received the bill of lading.

* * *

And even if the bank did not receive a bill of lading, Londono suffered no detriment proximately resulting therefrom or which was in the contemplation of the parties at the time he purchased the letter of credit. [136]

* * *

OPENING STATEMENT IN BEHALF OF
DEFENDANT MATSON

By Mr. Aldwell: [137]

* * *

The second point I would like to make is with regard to this mysterious bill of lading. Certain statements have been made by opposing counsel as to the bill of lading recently coming to light, and I thought it might be in order to make a short explanation which I think is due the court because of the fact that I personally have stated to your Honor, I believe at the pretrial conferences, that the bill of lading has never come into the possession of Matson subsequent to its issuance and, furthermore, as your Honor was undoubtedly aware, there are sworn statements in the file on the part of Matson making similar representations. So I think an explanation is due to the court.

The Court: Very well.

Mr. Aldwell: When we first came into this case, of course we attempted to get all of the information that we could with regard to the facts, and naturally one of the first things we asked for was the bill of lading. We were informed by the Matson people down here, and quite honestly on their part we believe, that they could not find it. As the case went along we again asked them if they would try and find the bill of lading. They again replied that they could not find it.

Based upon those statements—and they are in writing—we prepared the various pleadings and

affidavits and whatnot that were sworn to by the officers of Matson Navigation [138] Company. I also made those statements myself.

A week ago last Monday the original bill of lading was discovered in the Matson office at Wilmington. The circumstances under which it was discovered, briefly, were these:

In the preceding week I believe the Citizens Bank served a subpoena upon the resident vice president of Matson calling for the production of a number of documents, including the bill of lading in question. As a result of that subpoena it became necessary for the first time, we believe, for Matson to search through some files which they had not theretofore considered important. They found a number of the documents called for by the subpoena but they could not find either the bill of lading LA-29, the one that was directly involved in this case, nor could they find the bill of lading LA-22 which had been called for by the subpoena and which was the order bill of lading covering the Gonzalez & Blanco shipment.

They reported to Mr. John Morrow that they could not find either bill of lading, and Mr. Morrow told them that in view of the fact that a subpoena had been served they should do their utmost to find both bills of lading. In response to his request they put practically everybody that was employed by the Matson Company at Wilmington to work over that week end to try and find LA-22, having in mind that they never would find LA-29.

It was reported to us—I came down here; that was a [139] week ago Monday, and it was reported

to us—by telephone while I was sitting in Mr. Morrow's office that they had found both bills of lading. This was late in the afternoon of Monday

We immediately went down to Wilmington on Tuesday morning, last Tuesday, and investigated the thing thoroughly to find out the circumstances under which it had been found, which were that they had located a file containing spent order bills of lading and in there they had found LA-29, which was in the wrong file. They never previously thought of looking in that file for LA-29 because it was a straight bill of lading. So it wasn't the proper file for it.

When we returned from Wilmington on the afternoon of last Tuesday we immediately telephoned all counsel in the case and we had a personal conference with Mr. Bunn, Mr. O'Malley and Mr. Cramer—Mr. Diether of course being sick—and acquainted them with all of the details under which this bill of lading had come on to their attention. We telephoned Mr. Laven and we telephoned Mr. Dasteel.

I therefore am somewhat at a loss to explain Mr. Diether's statement that they had had no opportunity to investigate this matter because I believe that I made a complete and full statement at that time to Mr. Cramer. [140]

* * *

The Court: Matson was the berth agent on both ends?

Mr. Aldwell: Matson was the berth agent on both ends; yes, your Honor.

The Court: And Castle & Cooke was their sub-agent in Hawaii?

Mr. Aldwell: Correct. That is Castle & Cooke, Ltd. [146]

* * *

Our position is that this bill of lading, which is the subject of the controversy between the plaintiff and Matson, is a straight bill of lading where Dulien, as the consignor or shipper, and Dulien is also the consignee. It is a straight bill of lading, a contract between the Government, through Matson as agent, with Dulien.

The Court: If I understand your position correctly in that respect, it is this, that where it is a straight bill of lading the owner of the ship, or the berth agent, or whoever he is, is under no obligation to indicate any exceptions as to whether or not it is a clean bill of lading.

Mr. Aldwell: That is correct, your Honor, with one reservation: Where the shipper and the consignee are the same. If there is a third-party consignee the rule might be different, but we are not concerned with that here.

The Court: I understand.

Mr. Aldwell: But with the type of bill of lading that [147] was issued here, it is our position that we were under no duty to insert that because the law is perfectly clear that as between the carrier, the steamship company, and the shipper, you can always go behind the bill of lading. That is well settled. There is no question about that. So if that

is the case, there is very little point in noting exceptions on that kind of a bill of lading.

The Court: Where a person is shipping to himself?

Mr. Aldwell: That is right. It may be done, however, for this reason: If there should be a claim for damage to the cargo by that person after it is delivered at the destination point, it might be to the carrier's advantage to have some exceptions noted on the bill of lading in order to protect themselves.

The Court: I understand. [148]

* * *

The Court: There apparently will be some conflict of [150] testimony between the color of the oil and the color of the red dust in Honolulu.

Mr. Aldwell: Yes, your Honor. I think there will be considerable testimony on that.

Now as I said, it is our contention that we, either acting for ourselves or as agents for the Government, were under no duty to the plaintiff. We could not foresee that Dulien would attempt to transfer this bill of lading to a purchaser from him, and it wasn't reasonable for us to foresee that. Accordingly, it is our further position that the plaintiff had no right to act on that bill of lading. The plaintiff was experienced in commercial dealings, he knew the distinction between order and straight bills of lading. The fact is shown by his instructions to the bank. He wanted a clean on board *ocen* order bill of lading endorsed in blank. He knew what he wanted, and he knew the distinction. That is why he put it in there.

Furthermore, neither the bank nor the plaintiff actually acted on this bill of lading. As your Honor will have observed, there is undoubtedly going to be some conflict in the evidence as to whether the bank actually received this bill of lading or not. It is our contention that the bank never received the bill of lading, and we believe the evidence will show that. [151]

* * *

As far as the quality is concerned, of course, we allege and maintain that if there was a misdescription here on which the plaintiff has any rights against us and can recover against us, then we maintain that we were misled by the defendant Dulien who prepared the bills of lading through his agent.

The Court: If there was a misdescription Dulien did it, that is your position?

Mr. Aldwell: That is correct. And we are entitled to be indemnified. [153]

* * *

OPENING STATEMENT IN BEHALF OF UNITED STATES

Mr. Laven: The Government, of course, adopts the position taken by Matson relative to the shipment, and also in regard to the indemnity which they claim against Dulien by reason of their being the owner of the ship.

The Government has no quarrel with Mr. Bunn's original statement that the order bill of lading is

highly negotiable and that a straight bill of lading is not negotiable and of no importance. [155]

* * *

Nor did he in any way rely upon either the freight bill, because the freight bill did not come into his possession until after it had been spent and delivered to Matson on July 29th. The evidence will show that he never saw the bill of lading at any time, that he saw the freight bill long after the cargo had reached the dock and was being unloaded and, under the bill of lading, that as soon as the cargo is [156] discharged there is no further liability on behalf of the carrier.

* * *

That Mr. Londono did not have any greater rights by being an assignee of Dulien—the first time that that assignment was made was, I believe, on July 31, of the freight bill—so that Londono does not stand in any better position than Dulien, the shipper, and that Londono is subject to all of the equities as between the Government, the carrier and Dulien.

That the only claim here is that the carrier and its agent failed to indicate on the bill of lading that the cargo was rusty. We submit that under a straight bill of lading, being from Dulien to Dulien, being the same identical party, that there was no duty under the law, because under the bill of lading and the Carriage of Goods by Sea Act, the carrier has a right to rely upon the description and the weight given [157] to it by the shipper, and in the

event that that is not correct, has a right to be indemnified by the shipper, as was stated by Mr. Aldwell.

There is no claim here that the wire became rusty in transit. We submit that the purpose of the exceptions to be noted, as provided for in the bill of lading and in the Carriage of Goods by Sea Act, only applies to an order bill of lading and does not apply to a straight bill of lading, and its purpose is to protect the carrier from any claims that might be made by either the shipper or someone who is an innocent purchaser for value, such as a bona fide holder before any notice. [158]

* * *

April 19, 1950—2:00 P.M.

The Court: Mr. Bunn.

Mr. Bunn: I think it would be well at this time to have sworn the gentleman to interpret if and when his services are needed.

The Court: Very well.

Mr. Bunn: Mr. Blanco, will you come forward, please?

The Court: What language?

Mr. Bunn: Spanish, sir.

(At this point Harry C. Blanco was duly sworn to interpret from English into Spanish and Spanish into English.)

Mr. Dasteel: Your Honor please, may I inquire if the interpreter, Mr. Blanco, is the Blanco of the firm of Gonzalez & Blanco, or whether he has any connection with them?

The Interpreter: No, sir, I have not.

Mr. Dasteel: All right.

Mr. Bunn: Are you even acquainted with Mr. Blanco?

The Interpreter: No, sir. I know the firm, that it is here in Los Angeles, but I never had any dealings with them.

The Court: Does anyone want to examine the interpreter on voir dire?

Mr. Laven: No, sir. [162]

Mr. Aldwell: No.

The Court: Apparently not. You all thereby waive any disqualification.

* * *

J. B. LONDONO

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows: [163]

* * *

Direct Examination

By Mr. Bunn:

* * *

The Court: No. Let me ask Mr. Londono some questions.

Mr. Londono, we just swore an interpreter here. Your language is Spanish?

The Witness: Yes, sir.

The Court: That is, it is not the Mexican Spanish, it is the South American Spanish?

The Witness: Colombian Spanish.

The Court: Colombian Spanish? [164]

The Witness: Yes, sir.

(Testimony of J. B. Londono.)

The Court: You do speak English?

The Witness: I speak English.

The Court: And you understand it?

The Witness: Sometimes.

The Court: And sometimes you do not understand it?

The Witness: Yes.

The Court: In other words, you do not feel that you are fluent in the language?

The Witness: Yes.

The Court: And that you may need the aid of an interpreter?

The Witness: Yes.

The Court: You will understand, therefore, that at any time in these proceedings when a question is asked of you by counsel, if you do not understand it, you may ask to have the interpreter interpret for you rather than have every question asked of him. Do you understand the situation now?

The Witness: Yes.

The Court: In other words, anytime that it gets over your head in English you just so indicate.

The Witness: Yes. [165]

* * *

Q. (By Mr. Bunn): Will you give your full name? A. Jose Bernardo Londono.

Mr. Hubert Morrow: The witness will have to speak at least twice as loud as he is. [167]

The Court: Yes, I think so. He was just spelling his name. It is Joseph Bernardo Londono.

Now you talk to him and talk loud enough so that he can hear you.

(Testimony of J. B. Londono.)

The Witness: Yes, your Honor.

Q. (By Mr. Bunn): Where do you reside?
Where is your home?

A. Medellin, Colombia, South America.

Q. Of what country are you a citizen?

A. Colombia, South America.

Q. Were you born there? A. Yes.

Q. When? How old are you?

A. I am 38 years old. I was born in 1912.

Q. What is your business, Mr. Londono?

A. I am an importer.

Q. How long have you been so engaged in that business? A. From 1942.

Q. What business were you in before 1942?

A. I was in the transportation business in Colombia. I was acting for custom brokers.

Q. How old were you when you first began to do business involving shipping documents?

A. I was 28 years old.

Q. In the year 1946, what was your [168] business? A. Importer.

Q. For the entire year? A. Yes.

Q. Full year? A. Yes.

Q. Did you, before the year 1946, do any importing business with persons in the United States of America?

A. I used to import all my goods from the United States of America into Colombia.

Q. Louder, please.

A. I used to do all my business with the United

(Testimony of J. B. Londono.)

States of America, import business, from 1942 to now.

Mr. Diether: I didn't hear him.

The Court: He said he did all his business from 1942 up to now with the United States of America.

Q. (By Mr. Bunn): Do you mean that you did not do any importing business with persons in other countries than the United States?

A. With very few exceptions.

Q. Mr. Londono, in the beginning of the year 1946, did you know the difference between an order bill of lading and a straight bill of lading?

A. Yes.

The Court: By the way, do you read the English language?

The Witness: A little. [169]

The Court: Did you read it in 1946?

The Witness: Yes, your Honor.

Q. (By Mr. Bunn): Mr. Londono, in the beginning of the year 1946, what was your understanding of the difference or the differences between a straight bill of lading and an order bill of lading?

* * *

The Witness: I understood that the difference was that a straight bill of lading is not a negotiable document and an order bill of lading is a negotiable document; that the order bill of lading gave the title of the merchandise.

Mr. Diether: Whata was that last?

The Court: That the order bill of lading gave the title to the merchandise.

(Testimony of J. B. Londono.)

The Witness: And permit to sell the merchandise by the [170] documents. In other words, it is not necessary to have physical possession of the goods, just the documents.

The Court: That is the order bill of lading?

The Witness: Order bill of lading.

Q. (By Mr. Bunn): Had you before the beginning of the year 1946, dealt in order bills of lading in your own country? A. Yes.

The Court: And straight?

The Witness: On foreign business in Colombia, we always use order bill of lading because we make it on sight through the banks, but in business between two points of Colombia we sometimes use straight bill of lading.

The Court: So that you were familiar with a straight bill of lading?

The Witness: Yes, your Honor. [171]

* * *

Q. (By Mr. Bunn): Mr. Londono, in the transaction of the importing business and the handling of order bills of lading in Colombia in 1946, generally speaking, through whose hands would order bills of lading pass in a transaction?

The Court: On shipments from the United States?

Mr. Bunn: On shipments from the United States.

Mr. Dasteel: Your Honor please, same objection.

(Testimony of J. B. Londono.)

The Witness: Through the banks and through the brokers.

Mr. Diether: Just a moment.

I can't see, for the life of me, what the materiality is in connection with bills of lading handled in Colombia, what that may have to do with this case. They may have different rules and regulations entirely than we have here.

Mr. Dasteel: I join in that objection.

The Court: In view of the opening statements made by the bank and by Mr. Dasteel and Mr. Bunn, the objection is overruled. I will treat them as a motion to strike, but the motion to strike is denied because he had answered the question.

Q. (By Mr. Bunn): On a transaction involving a shipment of merchandise from the United States to you, as an importer in Colombia, on an order bill of lading how would the transaction be completed for your office, through a bank or [174] not?

Mr. Diether: That is objected to as incompetent, irrelevant and immaterial, and has no bearing on any of the issues involved in the case against the bank, how they would handle an order bill of lading in Colombia. We are only concerned here with the manner in which this transaction was handled in this country.

Mr. Dasteel: I join in that objection, your Honor.

Mr. Bunn: I will withdraw the question and satisfy counsel by asking another.

(Testimony of J. B. Londono.)

The Witness: It is practically an international practice. Shipping documents is the same here as in London, Hong Kong or any place else.

The Court: It is an international business?

The Witness: Yes, sir.

The Court: It is handled the same here as in Colombia or Hong Kong?

The Witness: Yes. The goods from the United States or Colombia and the documents are the same here in the United States. They are international documents.

Q. (By Mr. Bunn): Mr. Londono, did you in the year 1945, have any business—withdraw that.

Were you in the United States of America at any time in the year 1945? A. No, sir. [175]

Q. Were you here in the first six months of 1946?

A. Yes, sir.

Q. Did you in that period of time, the first six months of 1946, transact any business with the Citizens National Bank of Los Angeles?

A. Yes, sir.

Q. And about when was that?

A. It was in February, 1946. I think it was in March. It was in June, maybe July.

Q. You mean in February and March and June?

A. Yes. We had several business with the Citizens Bank.

Mr. Diether: I couldn't hear the answer.

The Court: We had several business with the Citizens Bank.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): When did you first make the acquaintance of Mr. Schroeder of the Citizens National Bank? A. The first time I saw him?

Q. Yes.

A. It was in February or March, 1946.

Q. Did Mr. Schroeder at that time handle any business transaction for you? Just answer yes or no, please. A. Yes.

Q. With what other person or persons in the foreign [176] department of the Citizens National Bank were you acquainted before July 1, 1946?

A. Mr. Powers.

Q. Any other? A. Mr. Moran.

Q. Before July 1, 1946? A. I think so.

Q. Had you, before July 1, 1946, ever established credit with the Citizens Bank? A. Yes.

Q. Had you put transactions through the foreign department of the Citizens Bank within that period?

A. Yes, sir.

Q. Had any one of those transactions been handled by any other person with you besides Mr. Schroeder? A. Mr. Powers.

Q. Now bringing us down to the early part of July, 1946—by the way, when did you arrive in Los Angeles the last time before July 11, 1946?

A. It was about May 6, 1946.

Q. Were you here continuously? A. Yes.

Q. Thereafter? A. Yes, until November.

Q. Now did you have a conversation with Mr. Schroeder [177] of the Citizens Bank in the month of June about barbed wire?

(Testimony of J. B. Londono.)

Mr. Diether: You are referring to 1946?

Mr. Bunn: Yes. All my questions are as to 1946 now unless I otherwise say.

The Witness: I don't remember if it was in June. I remember in June or July, 1946, we had several conversations about barbed wire.

Q. (By Mr. Bunn): Do you remember the first one specifically?

A. I don't know the date. It was in June or July, referring to one order for Colombia for barbed wire which credit came from the Citizens National Bank concerning a thousand tons of wire.

* * *

Q. Did you establish any credit at the Citizens Bank upon that occasion?

A. It was established in my favor for that bank in Colombia.

Q. Did you converse with Mr. Schroeder about that?

A. Yes, because I had difficulties to obtain the barbed wire.

The Court: What did you do, have a letter of credit from your bank in Colombia? [178]

The Witness: Yes, your Honor.

The Court: How much money?

The Witness: \$160,000.

The Court: And you took it to the Citizens Bank?

The Witness: Yes.

The Court: And dealt with Mr. Schroeder?

The Witness: Yes, sir.

(Testimony of J. B. Londono.)

The Court: Is that letter of credit here?

Mr. Diether: That is not quite correct, your Honor. The bank in Colombia, I think, requested the Citizens Bank to issue a letter of credit. It is a Citizens Bank's letter of credit rather than a Colombia bank.

The Witness: Yes.

The Court: In other words, the Colombia bank told the Citizens Bank that he was good for \$160,000?

Mr. Diether: That is correct.

Mr. Bunn: Then I won't have to prove that.

Q. Now did you after that——

The Court: Is there a document in connection with that mentioned barbed wire?

Mr. Bunn: There is a document. May I have No. 1, please?

(The document referred to was passed to counsel.)

Mr. Bunn: Gentlemen, I have in hand a photo-static copy of the item No. 1 that you all have on your list. [179]

Mr. Dasteel: If your Honor please, I would like to get squared away a little here.

Now the matters which are being referred to now and the interrogatories placed to the witness are long before the defendant Dulien had any connection with the plaintiff here, no transaction at all, and ordinarily, of course, if we were the only defendant we would strenuously object to that. But

(Testimony of J. B. Londono.)

I realize that it does affect the relationship with the bank. I would like to go on record as objecting to any testimony regarding any activity of any kind whatsoever that took place prior to the time that there was any meeting of the minds or any activity between the defendant Dulien and the plaintiff Londono.

The Court: Counsel, I can foresee that throughout the case there might be a situation arising like that, but there are four different defendants here, some evidence might be applicable to some, or admissible to some, and some might not be as to others. And you have no jury here—not that I, by virtue of that fact, have any greater intellectual powers than a jury has—but sometime along the road you have to take a chance as to whether or not the man who holds the position can discharge the duty, and this is one of them.

Mr. Dasteel: At least I have called it to the court's attention.

The Court: To apply the evidence that is [180] directed against the persons to which it is admissible. I think in that way considerable time might be saved. Otherwise the record will be full of objections.

Mr. Dasteel: I am perfectly willing to cooperate. I just wanted to go on record to that effect.

The Court: Very well. The objection is overruled.

Mr. Hubert Morrow: I think if we had an understanding that we need not object to evidence at that

(Testimony of J. B. Londono.)

stage when it is introduced, but that we reserve the right to move to strike it, or take advantage of the fact that at any proper time that it does not apply to any particular defendant, we may make such a motion.

The Court: I think perhaps you can save the record in that respect and everybody's rights.

Mr. Hubert Morrow: Everybody will be protected and we wouldn't need to interrupt every time.

The Court: In other words, any objection which might be made on the ground that it is incompetent, irrelevant and immaterial with relation to the particular defendant will be reserved as the basis of a motion to strike at the appropriate time.

Mr. Hubert Morrow: Yes, your Honor.

Mr. Dasteel: That applies to all defendants?

The Court: That applies to all defendants. [181]

* * *

Mr. Bunn: I am about to show the witness the document dated July 2, 1946. [182]

The Court: Exhibit 1 for identification?

Mr. Bunn: Yes, your Honor.

Q. Mr. Londono, I ask you if you received the original of that document, this being a photostat?

A. Yes, I received it. [183]

* * *

Mr. Bunn: But the document which I have handed the witness is the bank's advice to the wit-

(Testimony of J. B. Londono.)

ness that they have received the instructions from South America.

* * *

The Court: We will make it a part of 1. That will be marked 1-A for identification.

(The document referred to was marked plaintiff's Exhibit 1-A for identification.)

* * *

The Court: The plaintiff's exhibits will take a number and the defendants will each take letters, M for Matson, D for Dulien, et cetera.

Q. (By Mr. Bunn): That document is entitled "Confirmed [184] Irrevocable Straight Credit." I ask you if that is the letter of credit directed to you by the Citizens Bank? A. Yes, it is.

Mr. Bunn: I offer those as plaintiff's Exhibits 1 and 1-A. [185]

* * *

The Court: Very well. They are admitted in evidence, both of them.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 1 and 1-A.)

* * *

The Court: Just a moment. When did you get that paper?

The Witness: The first week of July, 1946.

Q. (By Mr. Bunn): Did you have any conversation with Mr. Schroeder in June or July, 1946, about your going to New Orleans?

(Testimony of J. B. Londono.)

A. Yes, sir. I asked Mr.—

Q. First, where did the conversation take place?

A. At Mr. Schroeder's office at the bank.

* * *

Q. What was that conversation?

A. I told Mr. Schroeder that in order to complete this order for a thousand tons of barbed wire for Colombia, I had to go to New Orleans to inspect the wire to see the wire that I bought from people here, which name is International Factors, and Mr. Schroeder got me a letter, [190] recommendation letter, for one bank in New Orleans stipulating that I had a letter of credit for \$160,000. In other words, Mr. Schroeder commanded the bank in New Orleans to help me in my transaction about barbed wire.

Q. Did you go to New Orleans?

A. No, because a few days later International Factors notified me that they can't complete the order because they had not the barbed wire.

* * *

Q. Now when did you first have any dealings with Dulien Steel Products of California, Inc., or Dulien Steel Products, Inc.? In America we say "Inc." for incorporated, abbreviated.

A. Yes, I understand.

Q. But I shall hereafter refer to any or all of them as Dulien. [191]

A. On July 11 I was notified that Dulien Steel Products, Inc., or Dulien Steel Products, Inc., of

(Testimony of J. B. Londono.)

California, had some barbed wire for sale. Then I was at Dulien's office in the afternoon of July 11, 1946.

Q. With whom?

A. With Mr. Arturo Rendon, of Colombia.

Q. Who else was present then and there? What other persons were present then and there at Dulien's office on the afternoon of July 11, 1946?

A. One Mr. Stinson, one Mr. Cuthill—they are supposed to be agents, sales agents, for Dulien.

The Court: Were they the ones who took you there?

The Witness: Yes, sir.

Then at Dulien's office I saw Mr. Grinstein, who confirmed to me that they had some barbed wire for sale, and I inquired about the quality and the quantity, the location, and Mr. Grinstein told me that the barbed wire consisted of one lot of 2700 tons, half galvanized, half black, coming from Honolulu, Hawaii.

I inquired about the quality and the samples. Mr. Grinstein took me out of the office in an open yard and show me a lot, small lot, maybe a hundred coils of barbed wire, black, covered with grease, and told me that the barbed wire, the black barbed wire, coming from Honolulu, will be equal to that barbed wire he showed me. [192]

Mr. Dasteel: If your Honor please, I move to strike the testimony of the witness on the grounds that there is being attempted to be offered by plaintiff parol testimony to change the terms of a written

(Testimony of J. B. Londono.)

contract. I refer your Honor to the case of United Iron Works v. Outer Harbor Dock and Wharf Company. It is Cal. 168, page 81. I will just read the syllabus here.

“Parol Evidence of Warranty in Case of Written Contract.

“Where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous or subsequent conversations, representations, or statements will not be received for the purpose of adding to or varying the written instrument. If, therefore, such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol; if it contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies.” [193]

And the court in this case upheld the objection that the testimony should not have been admitted, that it was inadmissible.

I have another case more up to date, in Cal. App. 90, Second Series. I can go into it at greater length, but I presume that I have offered the court enough law to show that any evidence regarding the condi-

(Testimony of J. B. Londono.)

tion, statements made prior to the time this transaction was entered into, at the time or afterwards, is inadmissible due to the reasons I have just set forth to the court.

Mr. Diether: If the court please, I would like to object to it and ask that it be stricken on the grounds that it is not responsive to the question. The witness was merely volunteering.

I also want to join in Mr. Dasteel's objection. I think that the rule is well settled in California that all preliminary negotiations prior to the entering into a contract are merged in the contract itself and consequently none of the preliminary negotiations or representations may be shown in the absence of fraud, and no fraud is alleged in this case. I think that the court should admonish the witness not to volunteer, but to merely answer the questions as they are propounded to him by counsel.

The Court: Your objection on the ground that the answer is not responsive is overruled. [194]

Do you wish to be heard on the other, Mr. Bunn?

Mr. Bunn: Your Honor, please, my understanding is that when representations are made constituting inducement to the execution of a contract, the inducement thereby becomes a part of the contract, and we have set out here fully——

The Court: The objection is overruled. The motion to strike is denied.

Mr. Diether: May it be understood that if any further conversation is elicited from this witness with respect to preliminary negotiations between

(Testimony of J. B. Londono.)

Mr. Dulien and Mr. Londono that they may be subject to the same objection?

Mr. Dasteel: And I would like to add to that, any negotiations or conversations regarding the merchandise purchased on this contract at the time or afterwards, that we object to it.

The Court: You may be deemed to have your objections to each and every question which goes to elicit such information without repeating them, and the ruling will be the same.

Q. (By Mr. Bunn): Now, Mr. Londono, on that occasion at Dulien's office, will you proceed with the balance, if any, of any conversation which you had then with Mr. Grinstein?

A. Yes. After——

Mr. Dasteel: Was this on July 11? [195]

Mr. Bunn: This was on July 11.

The Witness: On July 11, after I saw the black wire, I required some samples.

The Court: What was the condition of the black wire?

The Witness: It looked good, good wire.

The Court: Was it rusty?

The Witness: No, good wire, covered with grease, not rusty.

And Mr. Grinstein offered me to give me some samples of that wire, and I inquired about the quality of galvanized wire.

Q. (By Mr. Bunn): Did he show you any galvanized wire?

A. Yes, he showed me several coils, he had small

(Testimony of J. B. Londono.)

coils of galvanized wire, and he told me that the quality and the gauge would be equal to the wire coming from Honolulu. As galvanized wire is sold as a standard thing, I don't require samples.

Q. I beg your pardon?

The Court: He said, as galvanized wire is sold standard, I did not require samples.

Mr. Bunn: Thank you.

The Witness: After that conversation, after I saw the wire, I agree with Dulien to buy from him 2,700 tons of barbed wire. [196]

The Court: Did he give you samples?

The Witness: The next day. I agreed to buy 2,700 tons of barbed wire, half galvanized, half black, and it was late on the 11th, and I offered to come back the next day to complete the transaction. That was all our conversation in the 11th of July of 1946.

Q. (By Mr. Bunn): Was anything said about what you were going to do with the barbed wire?

A. We mentioned that the barbed wire was destined to go to Colombia, South America, and I told Mr. Grinstein, I am from Colombia and the reason I buy the wire is to ship the wire to Colombia.

Q. Is that all the conversation as you remember it? A. In essence, yes.

Q. Now, what did you do then? Come back to Los Angeles, to downtown?

A. Yes, I came to Los Angeles, downtown, and in the morning of the 12th—

(Testimony of J. B. Londono.)

Q. Let me get to that. Did you have any contact with Mr. Grinstein on July 12?

A. Yes, in the morning of July 12 I again was at Dulien's office.

Q. With whom?

A. Mr. Arturo Rendon. [197]

Q. And with the other two gentlemen you named?

A. I don't remember—yes, they were present, because they were there trying to get a commission from Dulien for the sale of the wire.

The Court: You mean Mr. Stinson and Mr. Cuthill?

The Witness: Yes, sir.

Q. (By Mr. Bunn): What time was that?

A. It was around 10:00 o'clock.

Q. At Dulien's office?

A. Between 10:00 and 11:00 o'clock.

Q. At Dulien's office? A. Yes, sir.

Q. Who was there from Dulien's establishment then, what person?

A. (Through Interpreter): I saw Mr. Grinstein and Mr. Stanley the first time, and a few minutes later Mr. Dulien himself come to the office.

Q. Now will you first tell us what conversation, if any, took place between you and Mr. Grinstein before Mr. Dulien came in to the group?

A. I required the samples, the cut samples, from Mr. Grinstein, and he got me the samples at that time, before they say that they will write the contract, and suggest for me to wait for Mr. Dulien,

(Testimony of J. B. Londono.)

who was coming from his house [198] to the office. Then we waited until Mr. Dulien come to the office.

Q. Did you see the contract before Mr. Dulien came?

The Court: Contract?

Mr. Bunn: He said they told him they would prepare a contract. That is his last answer.

The Witness: Yes, but in order to sign the contract I remember we waited for Mr. Dulien.

The Court: Did he give you the samples?

The Witness: Yes, Mr. Grinstein did.

The Court: Where are they now?

The Witness: I have the samples.

The Court: You have them?

The Witness: Yes.

The Court: Here?

The Witness: Yes, sir.

The Court: Very well.

The Witness: Would you like to see the samples?

Mr. Bunn: Just a moment. We will come to that. Gentlemen, I am about to show the witness the signed duplicate original of my document No. 2.

The Court: No. 2 for identification, which is Exhibit A in your complaint?

Mr. Bunn: Yes, your Honor, dated July 12, 1946.

Q. Mr. Londono, did you ever see that document before? [199] A. Yes.

Q. When first and where?

(Testimony of J. B. Londono.)

A. At Dulien's office, July 12, 1946, about 11:00 o'clock.

Q. Did you see that document before or after you were given samples of wire, cuttings?

A. I saw the contract after I got the samples.

Q. Now, do you now have in your possession the cuttings of wire, the samples, that were given you?

A. Yes, I have.

Mr. Bunn: Gentlemen, shall I pass these things around before I offer them?

Mr. Hubert Morrow: Have you offered No. 2?

Mr. Bunn: I haven't offered it yet.

The Court: It is 2 for identification.

Q. (By Mr. Bunn): Are those the samples there?

A. (Examining samples): Yes.

Q. How many are there?

A. Seven pieces of wire.

Q. Who gave them to you?

A. Mr. Grinstein of Dulien's office.

Q. Mr. Londono, where have they been since that time?

A. I had these samples with me from July 11, 1946, [200] until I came to you one day in August, 1946.

The Court: And you have had them ever since?

Mr. Bunn: I have, your Honor, since they were delivered to me. I have had them in my office. They were never taken out of my office.

Q. Mr. Londono, were they while in your possession treated with anything at all

A. No.

(Testimony of J. B. Londono.)

Q. Did you deliver them to me exactly as they were delivered to you?

A. Yes, sir. They are in the same paper.

Q. What kind of wire are those cuttings, Mr. Londono?

A. It is good wire, Mr. Bunn.

Q. Black or galvanized?

A. Black.

The Court: Are those 12 or 12.5 guage, 2 strand?

The Witness: Yes, sir.

The Court: And 4 point barbs?

The Witness: Yes, sir, they are.

The Court: Spaced at 3 and 4 inches apart?

The Witness: Yes, sir.

Q. (By Mr. Bunn): Do they now appear to you to be in the exact condition except for being nearly four years older than they were when you got them?

A. They look equal.

Mr. Diether: I didn't hear that.

The Court: It looks equal.

The Witness: Yes, sir.

Mr. Bunn: The plaintiff offers these cuttings of barbed wire as plaintiff's exhibit——

The Court: No. 36. Exhibit 36 will be the number.

Mr. Diether: Of the barbed wire?

The Court: Of the barbed wire.

Mr. Diether: May I object before it is received in evidence?

The Court: Yes, surely.

Mr. Diether: Your Honor please, in support of the same objection that I made previously, namely,

(Testimony of J. B. Londono.)

that all the preliminary negotiations relative to the purchase of this wire were merged in the contract in view of the fact that in the written contract no reference is made to any samples, I think that they are therefore incompetent, irrelevant and immaterial and not involved in any issue in connection with the cause of action against the bank.

Mr. Dasteel: Your Honor, was Plaintiff's Exhibit 2 simply offered for identification or offered in evidence? That is the contract.

The Court: He has not yet offered it in evidence. It is marked for identification only. [202]

The objection is overruled. No. 36 is received in evidence.

(The samples of barbed wire referred to were received in evidence and marked as Plaintiff's Exhibit No. 36.)

Q. (By Mr. Bunn): Now, Mr. Londono, after those cuttings of wire were handed you by Mr. Grinstein, what conversation, if any, was had between you and him and who, if any other person, was present?

A. When I got the samples of the wire and the contract it was ready to sign, Mr. Dulien he was in the office and I asked Mr. Dulien—Mr. Grinstein told me the day before that Mr. Dulien saw the wire in Honolulu—then I asked Mr. Dulien in person, "How is the quality of the wire?" and he told me that the wire is good, he saw the wire in Hono-

(Testimony of J. B. Londono.)

lulu, and he would like to buy an additional 50,000 tons of the same wire.

At the same time Mr. Grinstein told me that they bought the wire from the government at the price of \$28 per ton in Honolulu. I believe that is all Mr. Dulien say to me, and I signed the contract.

The Court: And Mr. Grinstein?

The Witness: Yes, sir.

Q. (By Mr. Bunn): Did you, yourself, have any actual part in the [203] preparation of the contract? A. I signed my name.

Mr. Bunn: Now, if I may have that document.

(The document referred to was passed to counsel.)

Q. (By Mr. Bunn): Now, I show you this document marked No. 2 for identification and ask you, is that the contract you signed?

A. Yes, it is. That is my signature here.

Q. Your signature is one of those illegible signatures, isn't it?

A. Yes, but I know it is mine.

Q. Did you see the affixing of the signature, E. S. Grinstein, to that? A. Yes, I saw it.

Q. You saw him sign it? A. Yes, sir.

The Court: Was Mr. Dulien present when he signed it?

The Witness: Yes, he was present.

On the reverse side of the original of this order there is a stipulation about the commission Dulien paid to the agents.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): This is the one that was delivered to you? A. Yes.

The Court: Did you sign the reverse side, too? [204]

The Witness: I don't think so, your Honor.

Mr. Bunn: May I see the original, Mr. Dasteel, since it has been brought into the testimony?

(The document referred to was passed to counsel.)

The Court: The record will show that Mr. Dasteel has handed Mr. Bunn a document.

Mr. Bunn: Yes. Have you seen this? I haven't seen it until today.

(Counsel examining document.)

Mr. Dasteel: Will you draw attention to the writing on the back, which has nothing to do with the transaction or the case or the issues between the plaintiff and the defendant here or any of them?

I might say, for the benefit of the court, while counsel is reading that, that the endorsement on the back there is simply an agreement to pay to two people a commission for the finding of the purchaser.

The Witness: Yes, I saw them sign it. I have memory of the fact at this time.

* * *

Q. (By Mr. Bunn): Now, Mr. Londono, the document [205] marked No. 2—that is the sale

(Testimony of J. B. Londono.)

order—was that delivered to you? A. Yes.

Q. On the occasion of July 12? A. Yes.

Q. Now, did you at that same conference see the other duplicate original, that is, this one?

The Court: Mark that 2-A for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2-A for identification.)

The Witness: Yes, sir.

Q. (By Mr. Bunn): Did you see, at that time, anything being written or that had been written on the back of 2-A? A. Yes.

Q. Was any or all of what now appears on the back of 2-A put on there in your presence?

A. Yes, sir. It was signed in my presence.

The Court: Any or all? Was all of it on there?

Q. (By Mr. Bunn): What portion of it was put on there in your presence?

A. I was present when it was signed, and I remember it was the full printing here.

Q. What about this pencil notation here? [206]

A. No, just the signature and the printed part.

Q. The typing, you mean? A. Yes.

Q. Was Mr. Grinstein's signature put on there in your presence? A. Yes, it was.

Q. And the signatures of Cuthill and Stinson?

A. Yes, sir.

Q. But you were not involved in that transaction, were you? A. No.

Mr. Bunn: We offer Exhibits 2 and 2-A as Plaintiff's exhibits.

(Testimony of J. B. Londono.)

Mr. Dasteel: If your Honor please, now that the contracts have been offered in evidence, I wish to renew my objections to them on the grounds, and to strike all testimony that has been offered by this witness prior to the offering of these documents, on the grounds that it was offered for the purpose of changing the terms of a written document. I have a further authority here, the case of *El Zarape, etc., Factory v. Plant Food Corp.*, in 90 C. A. (2d)—and this is in February, 1949; a recent case—and I will just read part of the syllabus.

Mr. Laven: What is the page number?

Mr. Dasteel: Page 336. [207]

“Since the parol evidence rule is not a rule of evidence but of substantive law, if evidence of conversations and negotiations preceding or contemporaneous with the execution of a writing is admitted, such evidence has no legal force and must be ignored.”

Mr. Bunn: We are not attempting to vary the terms of the contract, but to show the inducement by which the contract was entered into.

The Court: The motion to strike is denied.

Mr. Diether: May I also object on the same ground that Mr. Dasteel has just stated. My previous objection may have been premature in that the contract had not then been offered in evidence.

I would like to call your Honor's attention to a further case which holds that whatever the preliminary proposals may have been they were, of

(Testimony of J. B. Londono.)

course, merged in the written agreement and could not be given effect to add to, alter or modify its plain terms.

That is the case of *Brown v. Fletcher Aviation Corp.*, 67 C. A. (2d) at 855, at page 860. Petition for hearing in the Supreme Court was denied.

We believe that all these preliminary conferences and negotiations between Mr. Londono and Mr. Dulien were merged in this written contract, which has been offered in evidence, [208] and therefore cannot be used to vary the terms of that agreement.

I move, at this time, to strike all of the testimony of this witness heretofore elicited which goes to that preliminary proposal other than those that are incorporated in the contract itself.

The Court: The motion to strike is denied on the grounds suggested by counsel, and in addition to that, the document is not plain as to its terms.

Mr. Dasteel: If your Honor please, I wish to crave the indulgence of the court, and I appreciate the court's patience in this matter, but this is a very important matter to the defendant Dulien, this particular matter that we have objected to, and I wonder if the court would indulge me a little further by giving some indication for its ruling and in not granting the motion to strike the evidence.

The Court: I just did. I said, in addition to the grounds assigned by Mr. Bunn, the document is not plain as to its terms concerning the condition of the wire.

Mr. Bunn: Shall I proceed?

(Testimony of J. B. Londono.)

The Court: Yes.

Mr. Bunn: Are you through?

The Court: It is not plain because it is not plain what is meant by "as purchased by seller from Interior Department." When was it purchased, 40 years before? Five years [209] before? Ten minutes before? How are you going to explain that unless you have it by oral conversations or evidence?

Mr. Dasteel: That was the duty of the buyer to ascertain at the time. The buyer has a duty——

The Court: And, moreover, the phrase, "as purchased by seller from Interior Department," I realize what your contention is, you set them up in documents which have previously been filed, but I do not know—I will not say that I do not know—I will say this, that the document is not clear as to whether or not the condition of the wire as purchased is the same as at the time of the purchase, at the present time, and so on.

Mr. Dasteel: I was about to say that that would be attempting to read something into the contract that isn't there, your Honor.

The Court: No. I am just saying that an additional ground is that it is not plain what is meant by the document.

Proceed.

Q. (By Mr. Bunn): Mr. Londono, you said, I believe, that certain coils or rolls of galvanized wire were shown you at Dulien's yard. A. Yes.

Q. Was that on the 11th or the 12th?

A. On the 11th. [210]

(Testimony of J. B. Londono.)

Q. What was the apparent quality of that galvanized wire that they then showed you?

A. Brand new wire, it looked white, galvanized white.

Mr. Dasteel: Just a minute, if your Honor please. The witness has already offered in evidence the samples which he claims were samples of the wire.

Mr. Bunn: Of black wire.

Mr. Dasteel: Of black wire, and he said that he didn't see any galvanized wire before.

The Court: No, he said he saw several coils of galvanized wire.

Mr. Dasteel: He said he didn't get any samples of it.

The Court: He said he did not get any samples of it. His question is, however, what did the wire look like that he saw, and he has just answered, it looked like brand new wire, white galvanized wire.

Q. (By Mr. Bunn): Mr. Londono, in the conversation with Mr. Grinstein on the 11th, was there anything said about the method by which you would pay?

Mr. Dasteel: I object to that as being incorporated in the contract itself, specifying the terms of payment.

The Court: Overruled.

Q. (By Mr. Bunn): You may answer. [211]

A. Yes. I offered Mr. Grinstein to open the next day one credit for \$160,000 money that I am supposed to have at the bank with letter coming from

(Testimony of J. B. Londono.)

Colombia, or in my hands from Colombia, and additional credit for \$128,000 a few days later.

Q. Was there any conversation on that subject with Mr. Dulien on the 12th?

Mr. Dasteel: May I ask, are you asking if this statement he has just made was made on the 12th?

Mr. Bunn: No, he said that was made on the 11th.

Q. Was any conversation on that subject had on the 12th when Mr. Dulien was there?

A. Yes, it was confirmed, the same conversation the day before about the form of the payment, that is, letter of credit for \$160,000 the next day, and the other letter of credit for \$128,000 a few days later.

Q. Was anything said about the time of arrival of the ship, the time of the arrival of the ship bearing the wire?

A. It was said that the wire is coming from Honolulu and supposed to be arriving in Los Angeles on the 22nd of July.

Q. Now, do you think of anything else in the conversation of the 12th?

A. In essence, no, Mr. Bunn. [212]

Q. Speak as loudly as you can. Remember you are talking to that wall back there.

Where did you go from Dulien's office on the 12th?

A. I come to the bank, but I could not see Mr. Schroeder, I come to the bank to ask for the credit, but I could not see Mr. Schroeder because he was out of the office. Maybe he was sick.

(Testimony of J. B. Londono.)

Q. But he wasn't there, was he? A. No.

Q. Then where did you go? Did you have these samples with you? A. Yes.

Q. Where did you go?

A. I went to some engineers at Fourth Street, I remember, a gentleman who is supposed to be a friend of mine, because I was inquiring for some material.

Q. Don't tell us any conversation with that gentleman, but tell us where you went.

A. I asked him to inspect the wire, to see the quality of the wire with the samples, and I got the answer that the wire is good, strong enough, usable.

Q. Now when did you next have any communication of any kind from Dulien?

A. The 26th of July in the morning, I received a letter from Dulien. [213]

Mr. Dasteel: Just a moment. You have answered the question. Don't volunteer.

Mr. Bunn: May I have No. 3?

(The document referred to was passed to counsel.)

Mr. Bunn: I am about to show the witness this document——

The Court: No 3 for identification.

Mr. Bunn: Yes, your Honor.

Q. Have you seen that letter before?

A. Yes.

Q. When first?

A. In the morning of July 26 at Room 305, 408

(Testimony of J. B. Londono.)

South Spring Street. I receive this letter from the messenger, from the post office man.

The Court: You received a letter from the post office man?

The Witness: Yes.

Q. (By Mr. Bunn): Do you recognize the signature on that letter? A. Yes, Mr. Stanley's.

Q. You were by that time familiar with his signature? A. No, not in particular.

Q. But you received that by the mail?

A. Yes, special delivery mail, the same [214] day.

Mr. Bunn: I offer No. 3 for identification in evidence now. The document itself is dated the 25th. He said he received it on the 26th.

The Court: Admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Bunn): Now, Mr. Londono, before you received that letter, had you received from any source any information about the time of arrival of the ship on which the wire was coming?

A. Yes.

Q. When?

A. On July 15th, Monday afternoon, I called Mattoon and Mr. Mattoon in my presence called Matson Navigation Company inquiring for the arrival, the date of the arrival, of the White Squall, and we were informed that the boat, it was late, and for that reason I——

(Testimony of J. B. Londono.)

Mr. Dasteel: Just a moment.

The Court: How do you know it was the "White Squall"?

The Witness: Because Dulien told Mr. Rendon the name of the boat and Mattoon & Company inquired of the boat coming from Honolulu from Matson Navigation Company.

Q. (By Mr. Bunn): Did you then learn when the boat would arrive?

A. In addition, Mr. Bunn, Mr. Gonzales [215] told us the name of the boat which the wire is coming on.

Q. Then you knew before you got that letter that you have last mentioned? A. Yes.

Q. That the boat was going to be late?

A. Yes.

Mr. Diether: May we clear up one thing? Did he learn from Mr. Dulien on July 12th that the name of the boat was the "White Squall"?

Q. (By Mr. Bunn): Did you learn from Mr. Dulien at Dulien's office on July 12th the name of the ship?

A. I don't know if I knew from Mr. Dulien or from Mr. Grinstein, but I remember well I knew from Mr. Gonzales at his office.

The Court: In these conversations on July 11th and 12th, was the name of the boat mentioned?

The Witness: I don't remember, your Honor.

Q. (By Mr. Bunn): Before you received this last-mentioned letter, had you had any communica-

(Testimony of J. B. Londono.)

tion from Dulien about the quantity of wire being different from 2700 tons originally mentioned?

The Witness: May I have that again?

(The question referred to was read by the reporter, as follows: [216]

("Q. Before you received this last-mentioned letter, had you any communication from Dulien about the quantity of wire being different from 2700 tons originally mentioned?")

The Witness: No.

Q. (By Mr. Bunn): Now, you got that letter on the morning of July 26th? A. Yes.

Q. When did you next thereafter have any contact with Mr. Schroeder?

A. July 26th in the afternoon.

Q. Where? A. At the bank.

Q. Was anybody else present besides you and Mr. Schroeder? A. Mr. Arturo Rendon.

Q. Was any other person, apparently an employee of the bank, present in the conference?

A. No.

Q. Now, will you tell us what conversation on that occasion ensued?

A. I saw Mr. Stanley of Dulien in the afternoon of July 26th——

Q. Before you saw Mr. Schroeder?

A. Yes, before. [217]

Q. Where did you see Mr. Stanley?

A. In the afternoon of July 26th when I got the letter from Dulien I went into Dulien's office and

(Testimony of J. B. Londono.)

asked Mr. Stanley—Mr. Grinstein was out of the office—about the letter he wrote me the day before, and he told that the wire is coming, that the quantity will be reduced in 400 tons.

Q. Reduced what?

A. In 400 tons, and inquired of the letter of credit. I proposed to take 2,000 tons from the lot of 2,300 tons, and he told me that Mr. Grinstein will come the same day to Los Angeles, or accept from me to open the credit the next day for 2,000 tons barbed wire, at \$107 per ton.

Q. Is that all?

A. I insisted, I asked Mr. Stanley if he can sell to me 1,000 tons of barbed wire, galvanized wire, and I offered to pay to him any price for the galvanized wire, but he insisted I must take both, 1,000 tons of galvanized and 1,000 tons of black.

Then I promised to call Mr. Grinstein the next day to deliver the next day the letter of credit. And I come to the bank and saw Mr. Schroeder, explained to him about the negotiations—

Mr. Dasteel: Just a moment. I object to that.

Q. (By Mr. Bunn): Now, tell us what was said at the conversation with [218] Mr. Schroeder.

A. I come to the bank, saw Mr. Schroeder, asked him about—I told him about the negotiations of 2,000 tons barbed wire, and asked him to open a credit in favor of Dulien for \$214,000.

Q. \$214,000?

A. \$214,000, and I offered to him to use to collect the credit I had from Colombia for \$160,000

(Testimony of J. B. Londono.)

and asked Mr. Schroeder a loan for \$54,000 to cover the difference between \$160,000, my letter of credit, and the price of the wire that I bought from Dulien, \$214,000.

Q. What did Mr. Schroeder say?

A. Mr. Schroeder said that possibly he will agree, but he must contact with the loan department, and he asked me back the next day.

Q. Now, some time in that conversation of the 26th, was anything said then about the terms of the letter of credit you wanted, the conditions?

A. Generally speaking, no, because we—I noted the answer of Mr. Schroeder about the letter of credit. He told me to come back the next day.

Q. All right. Did you then later on the 26th have any communication with anybody from Dulien's place?

A. No, sir.

Q. Did you go to the Harbor on the 26th? [219]

A. No, sir.

Q. Now, what happened on the 27th, that is, did you have any contact with the bank on the 27th?

A. Yes, the 27th in the morning.

Q. What day of the week was that?

A. It was Saturday.

Q. Did anybody accompany you there?

A. Yes, Mr. Arturo Rendon. I saw Mr. Schroeder.

Q. Was anybody else present in the conversation?

A. No, not at that time.

Q. Now, tell us what was said.

A. I asked Mr. Schroeder about my previous

(Testimony of J. B. Londono.)

appointment, and he accepted to open me the credit on the condition that I would pay to the bank \$160,000, the bank will loan me \$54,000, guaranteed with the barbed wire.

Mr. Bunn: Guaranteed?

The Court: By the barbed wire, guaranteed by the barbed wire.

The Witness: And he had me to open the credit, and we discussed the commission.

Q. (By Mr. Bunn): What was said about the commission? A. One-fourth of 1 per cent.

Q. Was there any discussion about it?

A. Yes. [220]

Q. What discussion?

A. The first time Mr. Schroeder asked me for one-half per cent, and I suggested one-fourth per cent.

Q. For one-half per cent?

A. Yes, and I suggested, and he agreed to collect, to charge me, one-fourth of 1 per cent.

Q. Was there anything else said about the terms or conditions of the credit?

A. Yes. I explained to Mr. Schroeder that I required a commercial letter of credit, and I explained to him the documents I required.

The Court: What did you say about the documents?

The Witness: I required the bill of lading, an order bill of lading, negotiable bill of lading, on board, freight prepaid, and clean bill of lading, commercial invoice, insurance certificate. We dis-

(Testimony of J. B. Londono.)

cussed about the insurance, and Mr. Schroeder called his secretary, made the application for letter of credit, called his secretary and dictated the letter of credit.

Q. (By Mr. Bunn): Did you hear the dictation?
A. Yes, sir. It was very close to me.

Q. Any further conversation then?

A. Yes. Mr. Schroeder asked me about when I will pay the bank the money, the \$54,000, and I offered Mr. [221] Schroeder to require the credit from Colombia.

Then I signed the application for letter of credit, and several minutes later I got the letter of credit from the bank. I delivered to Dulien in person, to Mr. Grinstein——

Q. Just a minute, please, sir.

Mr. Clerk, may I have original No. 4 and No. 5?

(The documents referred to were passed to counsel.)

Mr. Bunn: I am about to hand the witness document No. 4 for identification.

Q. Mr. Londono, have you seen that document before?

A. Yes. I signed the document on the 27th of July at the Citizens National Bank office.

Q. That is your signature?
A. Yes, it is.

Mr. Bunn: We offer as Plaintiff's Exhibit No. 4 in evidence now, the application for letter of credit.

The Court: This is the original?

Mr. Diether: That is correct.

(Testimony of J. B. Londono.)

The Court: Very well.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. (By Mr. Bunn): Mr. Londono, at that time did you sign anything on the back of that document? [222] A. No.

The Court: Nor did you sign a copy?

The Witness: I don't remember.

Mr. Bunn: We are trying to find it.

You have the original guarantee. May I have it?

Mr. Diether: All right.

Mr. Bunn: Mr. Diether, I have a photostatic copy but I don't have the original.

Mr. Diether: I have the original.

(The document referred to was passed to counsel.)

Q. (By Mr. Bunn): Now, Mr. Londono——

I am showing the witness, gentlemen, the document not heretofore numbered in my exhibits, being a carbon copy of irrevocable credit No. 3645, dated July 27, 1946, on the back of which appears an original signature of Mr. Londono.

Number 4 has been admitted, has it not?

The Court: Number 4 is admitted.

Mr. Bunn: The application for letter of credit?

The Court: Yes. You can mark that 4-A for identification.

(The document referred to was marked Plaintiff's Exhibit No. 4-A for identification.)

(Testimony of J. B. Londono.)

Mr. Hubert Morrow: May I be clear on that? That is a copy of the application? [223]

Mr. Bunn: No, sir, this is a copy of the original credit, but on the back of that copy——

The Court: Just a moment. Number 4 is the original application?

Mr. Bunn: Yes, sir.

The Court: That is a copy of the application?

Mr. Bunn: No, sir. This is a copy of the letter of credit, but on the back of this copy is an original signature that I want now to introduce.

Mr. Hubert Morrow: To keep the record straight, shouldn't that be 5-A? It is a copy of the letter of credit.

The Court: Yes.

Mr. Bunn: I think it should be.

Mr. Diether: That document that counsel has just referred to is a document which is commonly referred to as the letter of credit guarantee, and which is the same document as I referred to in my opening statement.

The Court: Number 4 is the application for commercial letter of credit, unsigned on the back.

Mr. Diether: That is correct.

The Court: Then No. 5—we do not have No. 5.

Mr. Bunn: We don't have it yet because I have to put them in in order here.

The Court: Where is No. 5? [224]

Mr. Bunn: I have it right here.

The Court: The original?

(Testimony of J. B. Londono.)

Mr. Bunn: Yes, sir, but before No. 5 is offered, the writing on the back of 4-A——

The Court: That is No. 5-A now. We will change it to 5-A.

(The document referred to was marked Plaintiff's Exhibit No. 5-A for [225] identification.)

The Court: It will be so marked because it is a copy of No. 5, if I understand it correctly.

Mr. Bunn: That is right.

Mr. Diether: Yes, your Honor.

Q. (By Mr. Bunn): Now, Mr. Londono, did you on that occasion sign the writing on the back of this document? I am showing you 5-A for identification. A. Yes.

Q. And that is your signature there?

A. Yes. And I marked the date with my own hand.

Q. You wrote that date in, July 29——

A. July 27.

Q. July 27, 1946? A. Yes, I marked that.

Q. And delivered that or left it with Mr. Schroeder?

A. The foreign department of the bank.

Mr. Bunn: We offer that as Plaintiff's Exhibit No. 5-A.

The Court: Admitted.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 5-A.)

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): Now, Mr. Londono, at the same time was there issued and delivered to you this No. 5 for identification? A. Yes. [226]

Q. Now, that is the original letter of credit?

A. Yes, it is.

Q. Were you at that time given a copy of that?

The Court: A copy of what?

Mr. Bunn: Of that document, the original letter of credit, No. 5, your Honor.

Q. ———or were you just given the original?

A. I am sure about the original. I don't remember about the copy.

Q. Were you given the original then of No. 5?

A. Yes.

Q. Did any further conversation then take place between you and Mr. Schroeder then and there?

A. Not that I can remember now.

The Court: Was the letter of credit, the original letter of credit, filled out in the typing in your presence at the same time as the application was? Did the girl fill that out at the same time you filled the application out?

The Witness: No, afterwards.

The Court: Immediately afterwards?

The Witness: Yes, immediately afterwards.

The Court: Was it the same occasion?

The Witness: Yes, same time.

The Court: She did not do both of them at the same time?

The Witness: No. Excuse me. [227]

Mr. Diether: I believe your Honor stated in

(Testimony of J. B. Londono.)

your question if he filled it out. I believe his testimony was that it was filled out by Mr. Schroeder.

The Court: What I am trying to get at, did the girl fill it out in his presence on the same occasion as he has testified Mr. Schroeder had the girl fill out the application.

Mr. Diether: That is correct.

The Witness: Yes.

Q. (By Mr. Bunn): Did you hear the dictation? A. Yes.

Q. By Mr. Schroeder of the fill-in for the letter of credit? A. Yes, sir, I did.

Mr. Bunn: Now they both have been received, I believe?

The Court: There was something on the back of one of these, No. 5. I do not know whether you want that in or not.

Q. (By Mr. Bunn): Now, Mr. Londono, when the original letter of credit, No. 5, was delivered to you by Mr. Schroeder, did it contain the endorsement which it now shows on its back?

A. Of course not.

The Court: Did you ever see that before now?

The Witness: No, sir. [228]

The Court: Do you offer the front side?

Mr. Bunn: I offer the front side, yes, sir.

The Court: The front side is admitted.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 5.)

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): Now, Mr. Londono, what did you do with that original letter of credit?

A. I delivered it to Dulien Steel Products.

Q. When? A. About——

The Court: Just a minute now. Across the face of this is written the word “Exhausted.”

Mr. Bunn: That I should have cleared up.

Q. Was the word “exhausted” on there?

A. No.

Q. When the original was delivered to you?

A. No, sir. I suppose that is printed by the bank after they paid the credit.

The Court: What about those initials on the side and the strikeouts portions?

Mr. Bunn: It is obvious here that four lines of the printing on the form have been struck out, and in each margin appear the initials “W. G. P.”

Q. Were these initials on there when the credit was [229] given to you?

A. I can't say because I don't pay attention to that. I remember the lines, it was marked.

The Court: The lines were stricken out?

The Witness: Yes, they were.

Mr. Bunn: Now this notation up in the upper right-hand corner, “Defendant's A, P. S. Noon,” gentlemen, you all know what that is, do you not?

The Court: That is the notation of the deposition reporter.

Mr. Diether: That is correct.

The Court: That is on a number of these documents.

(Testimony of J. B. Londono.)

I suppose it will be stipulated that that was put on there by the reporter, Mr. Noon, when the deposition was taken, which was after the transaction?

Mr. Diether: So stipulated.

Q. (By Mr. Bunn): What did you do with the original letter of credit?

A. I went to Dulien's office and delivered it to Mr. Grinstein in person.

Q. About what time?

A. About 11:00 o'clock of July 27.

Q. Which was—— A. Saturday.

Q. Saturday? [230] A. Yes.

Q. Did you have any conversation then with Mr. Grinstein? Now if you did, tell us who else was there? A. Yes.

Q. Who else was present, if anybody?

A. I went with Mr. Arturo Rendon, and I think Mr. Stanley was there, too. I delivered the credit to Mr. Grinstein. I said, "This is big business for me."

Q. Louder, please.

A. I delivered the letter of credit to Mr. Grinstein and I say to him that it is big business for me. He answered, "Big business for me, too." And on that particular time, that particular occasion, he told that they pay to the government, Interior Department, \$28 per ton for this wire.

Q. You said a while ago that he told you that on the 27th, you mean on the 11th?

A. No, it was on the 27th when I delivered the letter of credit. It was clear in my mind.

(Testimony of J. B. Londono.)

Q. Anything else in that conversation?

Mr. Diether: Just a moment. May I move to strike that answer on the ground that it is incompetent, irrelevant and immaterial, as to what Dulien may have paid the government for this wire. It has no bearing on the issues involved in the case.

The Court: Motion denied. [231]

Q. (By Mr. Bunn): Now, that brings you up to about Saturday noon, doesn't it?

A. More or less.

Q. Then where did you go Saturday afternoon, July 27?

The Court: You mean in relation to this matter?

Mr. Bunn: Oh, yes; of course.

The Witness: After I delivered the letter of credit to Mr. Grinstein, I and Mr. Rendon went to have lunch on the way to Long Beach to see the wire. We inquired about the fact if the White Squall, the boat, carried the wire, if it was or was not in the dock at Pier 1-A at Long Beach, and we discovered that the White Squall had arrived.

We inquired from some man in the boat about the cargo, about the wire, and he told that no officers were aboard at that time and told us that we can't see nothing because the hatches were closed.

Then we went to Los Angeles.

Q. Did you go onto the boat at all?

A. Yes, up on——

Q. On the deck?

A. I was looking around the boat.

(Testimony of J. B. Londono.)

Q. Did you see any wire at all? A. No.

Q. About what time was that? [232]

A. It was between 2:00 o'clock and 3:00 o'clock.

Q. On Saturday afternoon?

A. Saturday afternoon.

The Court: That was the 28th?

Mr. Bunn: No, sir, the 27th.

The Witness: The 27th.

Q. (By Mr. Bunn): Then you came back to Los Angeles? A. Yes, sir.

Q. Now, the next day, Sunday, the 28th, do you of your own knowledge know whether or not there was any unloading of wire on that day?

A. No.

Q. Where did you go on that day?

A. I went to church.

Q. Did you go to the dock? A. No.

Q. Did you on that day see anybody from Dulien's place A. No.

Q. Or anybody from the bank? A. No.

Q. Now on Monday, the 29th of July, did you have any contact whatsoever with anybody from the Citizens Bank, any communication? [233]

A. Yes, on the 29th.

Q. What communication did you have?

A. On the 29th, about 10:00 o'clock, I was at the Hotel Clark and I had telephone call from the bank. I identified Mr. Thomas Moran because he spoke in Spanish.

Q. Had you previously talked with Mr. Moran in the bank at all? A. Yes, several times.

(Testimony of J. B. Londono.)

Q. You knew his voice?

A. Yes, Mr. Schroeder introduced him to me and I knew him. I recognized his voice, and he told me, "This is Moran."

Q. What were you engaged in when the call came in?

A. I was in the bath taking a shower, I remember.

Q. You answered the telephone?

A. Yes, I answered.

Q. Tell us what Mr. Moran said and what you said.

A. He say that they had the documents from Dulien but that there is some discrepanices between the requirements of the letter of credit and the documents because the documents—he used the word "documents"—showed 2300 tons of barbed wire instead of 2000 tons of barbed wire.

I answered Mr. Moran that that was agreed with Dulien that I bought 2000 tons of barbed wire, that the bank is going to pay for 2000 tons. I say that it is all right because it is very clear that I agree with Dulien to buy just 2000 tons of [234] barbed wire.

Q. Now, give us all of the conversation, all of that conversation that you remember.

A. In essence, that was the conversation.

Q. Is that all? A. Yes.

Q. Then what next occurred?

A. About 10 minutes later I was ready to leave because I had an appointment with Dr. Olson, I

(Testimony of J. B. Londono.)

had another telephone call, Mr. Moran again, and he asked me if necessary to have from Dulien a letter stipulating the fact that I will have 2000 tons of barbed wire instead of 2300 tons of barbed wire.

I say that it is not necessary in my opinion because it is a fact that I bought from Dulien 2000 tons of barbed wire.

Q. Is that the whole of the conversation?

A. In essence, yes.

Q. Was anything in either of those conversations said specifically about a bill of lading?

A. No. He used the word "documents."

Q. Did he say anything about—you have told us everything he said? A. Yes.

Q. Then what happened?

A. I went in to Dr. Olson because I had an appointment, [235] and later in the afternoon—I saw Dr. Olson, of course—late in the afternoon I went in to Long Beach with Mr. Rendon.

Q. Where did you go?

A. To Long Beach, to Pier 1-A, to see the wire.

Q. When you got there did you see anybody working there?

A. No, it was late. Nobody was working there.

Q. What did you observe?

A. I observed a lot of barbed wire, small quantity, several coils of barbed wire, on the dock but I could not identify the wire or ask somebody about which wire is that wire because nobody was in the dock.

(Testimony of J. B. Londono.)

I went back to Los Angeles late in the afternoon.

Q. Did you at any time on the day of Monday, July 29, 1946, go into the Citizens Bank?

A. No.

Q. Or talk with anybody of the Citizens Bank except Mr. Moran in the telephone conversation?

A. No.

Q. Then what did you do on Tuesday, the 30th—withdraw that.

Did you on Monday, the 29th, receive any documents, any papers, from the Citizens Bank, on Monday the 29th? A. No. [236]

Q. Or any other message from the Citizens Bank than the telephone calls you have told us about?

A. No.

Q. Now on the 30th, Tuesday, where did you go?

A. I think I went to St. Vincent Hospital for a general inspection.

The Court: Anything with relation to this case. Did you go to Dulien's or the bank?

The Witness: No, your Honor. In the afternoon of the 30th I went to Long Beach, Pier 1-A, and Mr. Rendon, with a wire-cutter.

The Court: A pair of pliers, is that what he said?

The Interpreter: A pair of pliers, yes, sir, wire-cutter.

The Court: Wire-cutting pliers?

The Interpreter: Yes, sir.

The Court: Is that what he means?

The Interpreter: Yes, sir.

(Testimony of J. B. Londono.)

The Witness: He took several samples of wire from the lot in the dock.

Q. (By Mr. Bunn): Did you observe any men unloading wire then?

A. No, because it was late. It was around 6:00 o'clock. We went with Mr. Rendon and Mr. Hector Silva Herrera, a Colombian lawyer. [237]

Mr. Hubert Morrow: We can't hear him.

The Court: Are you now through the 29th?

Mr. Hubert Morrow: We would like to hear what happened when he went to Long Beach on the afternoon of the 29th.

The Court: I can tell you what his testimony was. He said that nobody was working, that it was late, he saw several coils of barbed wire on the dock, he could not identify them as nobody was there. From there on he did not go to the bank that day or he did not talk with anybody in the bank except the conversation with Moran.

Mr. Hubert Morrow: There was something about some pliers.

The Court: This is on the 30th. He said he went down to Pier 1-A with Mr. Rendon with a pair of pliers and clipped off several chunks of wire from the lot on the dock. It was 6:00 o'clock. We are up to that point now.

Mr. Hubert Morrow: Thank you.

Q. (By Mr. Bunn): And nobody was working?

A. Nobody was working. It was late. It was about 6:00 o'clock.

(Testimony of J. B. Londono.)

Q. Now had you on Tuesday, the 30th, been in the bank? A. No.

Q. Or had any personal communication with anybody from Dulien's office? [238] A. No.

The Court: We will recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Thursday, April 20, 1950.) [239]

April 20, 1950

Direct Examination
(Continued)

By Mr. Bunn:

Q. Mr. Londono, you called my attention this morning to something you said you omitted from the recitation of the conversation on the 27th at Dulien's office when you took the letter of credit.

A. Yes.

Q. About an option? A. Yes.

Q. Are you about to tell us a conversation?

A. Yes.

Q. With whom now?

A. With Mr. Grinstein, Dulien officer, when I delivered the letter of credit, I asked Mr. Grinstein for one option for the 300 tons of wire remaining, and he accepted, gave me the option. [242]

Q. Was there anything in writing on that?

A. No.

(Testimony of J. B. Londono.)

Q. Now we arrived last night in our course of testimony at the end of the day of Tuesday, the 30th of July. Will you tell what you did, if anything, in relation to this transaction or any one of them on July 31, 1946, Wednesday?

A. Yes. The 31st, about midday, about noon, I saw Mr. Sweeney of Mattoon & Company, who told me that Mr. Schroeder from the bank required me to go to the bank, and we went to the bank about noon the same day, and I saw Mr. Schroeder, who take me down to the office of the bank in order to sign a promissory note for \$54,535. That means the loan that the bank made me for the payment of the wire, the balance between the cost of the wire, \$214,000, and \$160,000 that I got from the bank.

Mr. Bunn: Now Mr. Clark, may I have the notes; that is, No. 21, 22, 17, 18, 19 and 20?

(The documents referred to were passed to counsel.)

Mr. Bunn: Gentlemen, I am about to show Mr. Londono certain of these documents, the numbers of which I have just called.

Q. I show you No. 22 for identification, which is a photostatic copy—

If your Honor please, Mr. Diether says that tomorrow he will be able to substitute the [243] original.

Q. —and ask you, Mr. Londono, calling your

(Testimony of J. B. Londono.)

attention to that portion of this document above the perforation line——

Mr. Dasteel: Pardon me, Mr. Bunn. Will you be kind enough to announce the date of the document and who it is from and who it is to so I can check it with the exhibits?

Mr. Bunn: Excuse me. July 31, promissory note to the Citizens Bank.

Q. Mr. Londono, is this document above the perforation line a photostatic copy of the note which you just said you signed? A. Yes, it is.

Q. With the exception of the No. 22 in blue there? A. Yes.

Q. Now at the time you signed such a note, did it have a form below the perforation line?

A. I didn't pay attention to that. I recognize my signature and it is my own signature.

Q. Did you write in the lower left-hand corner "408 South Spring"? A. No.

Q. That is not your handwriting?

A. That is not my handwriting.

Q. But this is a copy of the note that you did sign? A. Yes, sir.

Q. And so far as the part below the perforation line, [244] you do not remember? A. No.

Q. And did you look at the back side of the document that you signed? A. No.

Mr. Bunn: We offer this to be substituted tomorrow by the original but to be marked as Plaintiff's Exhibit 22 in evidence, that is, the portion of it above the perforation line.

(Testimony of J. B. Londono.)

The Court: Admitted.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 22.)

Q. (By Mr. Bunn): Now I am handing the witness my document No. 21, likewise marked for identification, dated July 31 and entitled "Deposit of Collateral." Mr. Londono, does that document bear your signature? A. Yes, it is.

Q. When you signed it, did it contain any of the penciled memoranda which are now on it?

A. No.

Q. Was the signature that appears to be that of R. Nelson for the bank on there?

A. I don't remember. I recognize my signature. That is all I remember. [245]

Q. Did you at that time, in the conference that you have just been telling about, sign a deposit of collateral agreement? A. Yes.

Q. And this was it? A. Yes, it is.

Q. I call your attention to the fact that the typing in that is a carbon typing? A. Yes.

Q. But that the document bears across its face in large red letters the word "original."

A. Original.

Q. But your signature is an original signature?

A. It is.

Mr. Bunn: We offer that in evidence as Plaintiff's Exhibit No. 21.

The Court: Admitted.

(Testimony of J. B. Londono.)

(The document referred to was received in evidence as Plaintiff's Exhibit No. 21.)

Mr. Bunn: Now at this time I ask counsel, on order that we may put this in chronologically, as chronologically as possible, to join me in a stipulation that the document, No. 17, customer's draft dated July 29, 1946, by Dulien Steel Products, Inc., of California, with the signature purporting to be L. P. Stanley, was—— [246]

Mr. Diether: For \$214,000.

Mr. Bunn: Yes—is the original draft for \$214,000 which on July 29, Monday, was by Mr. Dulien presented to the Citizens Bank, together with certain other documents that I shall enumerate.

Mr. Diether: So stipulated.

Mr. Bunn: The bank's counsel so stipulates.

The Court: I do not know what "together with certain other documents you shall enumerate" means.

Mr. Bunn: I will withdraw that part of it then. That this is the original sight draft presented by Dulien.

Mr. Diether: I so stipulate.

Mr. Dasteel: I so stipulate.

Mr. Laven: The government has no objection.

Mr. Hubert Morrow: We will so stipulate.

Mr. Bunn: We offer that as Plaintiff's Exhibit 17.

The Court: Admitted.

(Testimony of J. B. Londono.)

(The document referred to was received in evidence as Plaintiff's Exhibit No. 17.)

Mr. Bunn: Now I have in my hand No. 18 for identification, which is check No. 349929, cashier's check, dated July 29, 1946, signed by D. M. Wilkinson for the Citizens Bank, payable to Dulien Steel Products, Inc., of California, in the sum of \$214,000, and ask counsel for all defendants to join me in a stipulation that that is the original cashier's [247] check by which Dulien's draft of \$214,000 was paid by the Citizens Bank on the date it bears, namely, July 29.

Mr. Diether: So stipulated.

Mr. Hubert Morrow: That is so stipulated.

Mr. Laven: The government so stipulates.

Mr. Dasteel: So stipulate.

Mr. Bunn: I offer it as Plaintiff's Exhibit No. 18.

The Court: Just a moment. As to No. 17, did the stipulation include the fact that the draft had on its face all of the typing which now appears thereon?

Mr. Bunn: May I see it?

(The document referred to was passed to counsel.)

Mr. Bunn: I will expand the request and ask that the stipulation regarding No. 17 be expanded to include that.

The Court: That at the time of its presentation

(Testimony of J. B. Londono.)

it was in the identical form that it bears now except for the rubber stamp "Paid" on the face?

Mr. Bunn: Yes, sir.

The Court: And on the reverse, what about the endorsement on the reverse?

Mr. Bunn: First, may I add, and that the paid stamp which is now there was placed there on July 29, the date that it bears.

The Court: On July 29?

Mr. Diether: So stipulated. [248]

The Court: The date is written over it, it is stamped "28" and written over it "29."

Mr. Diether: It is unquestionably the 29th, your Honor.

The Court: Is that stipulation accepted?

Mr. Laven: The government accepts it.

Mr. Dasteel: So stipulated.

Mr. Hubert Morrow: So stipulated.

The Court: What about the back side?

Mr. Bunn: And that the back side bears the following endorsement: "Pay to the Order of Citizens National Trust & Savings Bank of Los Angeles, Dulien Steel Products, Inc., of California, by L. P. Stanley," and that that endorsement was placed thereon at the time of the presentation and clearance of the draft.

Mr. Diether: So stipulated.

The Court: In other words, upon that endorsement this cashier's check in the sum of \$214,000 was drawn.

Mr. Laven: So stipulated by the government.

(Testimony of J. B. Londono.)

Mr. Diether: So stipulated.

Mr. Hubert Morrow: So stipulated.

Mr. Dasteel: So stipulated.

Mr. Bunn: That completes No. 17, I believe.

Mr. Diether: Of course it is understood, your Honor, by that stipulation that we do not stipulate that other documents weren't presented at the same time, but merely that [249] that was one of the documents that was presented. In other words, you said, pursuant to that we issued that check.

The Court: Pursuant to this endorsement.

Mr. Diether: And the presentation to the bank of other documents, which I take it will come out in the testimony.

The Court: Very well, then. If you do not want to accept the stipulation. My thought was, what happened was this: This was presented. It calls for \$214,000. Stanley bought a cashier's check with it.

Mr. Diether: No, that is not correct. The draft was presented for \$214,000, together with other documents, and then upon the examination of those documents the check for \$214,000 was paid, was handed to Dulien. I don't want the stipulation to be understood that we paid it merely upon the presentation of that draft only.

The Court: In view of the opening statements made by counsel, I can see where they would not be justified in stipulating to the statement which you have just made.

(Testimony of J. B. Londono.)

Mr. Diether: I am not saying what other documents there were, but I say that I don't want to limit it, that that was the only document that was presented. I don't want to bind other counsel, of course.

The Court: At the time that No. 17 was presented?

Mr. Diether: That is correct.

Mr. Bunn: I so understood counsel. The purpose of the [250] stipulation basically is to show that that is the cashier's check which was issued in payment of the draft.

Mr. Diether: Yes, but it wasn't on that alone.

Mr. Bunn: I don't ask that you stipulate that no other documents were presented, but that that draft was presented and that this is the cashier's check which on the 29th of July was issued in payment of the draft.

Mr. Diether: There is no question about that.

The Court: Very well.

Mr. Diether: But at the same time it is understood that we received other documents, and you so stipulate, don't you, Mr. Bunn?

Mr. John Morrow: That is not the stipulation as far as we are concerned. We are not stipulating at this time that any other documents were received except the original freight bill. We didn't understand that any other stipulation was called for.

The Court: I understood Mr. Bunn's stipulation to be limited to this and not with relation to

(Testimony of J. B. Londono.)

any other documents and not an attempt on Mr. Bunn's part to foreclose any evidence concerning the presentation or lack of presentation of other documents.

Mr. Bunn: That is my position.

The Court: But simply that this was the draft presented and this was the cashier's check which this draft bought. [251]

Mr. Diether: With that understanding, I have no objection.

The Court: Very well.

Mr. Bunn: Now, Mr. Diether, may I put this in?

Mr. Diether: Yes.

Mr. Bunn: Now, gentlemen, I have in hand document No. 19 for identification dated July 27, 1946, bearing No. 3645, entitled "Commercial Credit" and appearing to be out of a bound book, and ask counsel—have you seen this?

Mr. Laven: Yes.

Mr. Bunn: —to join me in a stipulation that on July 27, 1946, Saturday, the bank opened on its books the commercial credit account evidenced by this document in favor of Dulien Steel Products, Inc., for account of J. B. Londono.

The Court: What is it?

(The document referred to was passed to the court.)

The Court: Mr. Diether, this I take it is an original document from the bank's records?

Mr. Diether: It is, your Honor.

(Testimony of J. B. Londono.)

The Court: And are you asking for a stipulation that this document shows what it shows? [252]

* * *

Mr. Bunn: I want it left now, in view of the discussion, as marked for identification and then I can ask questions about it fully.

The Court: Very well. No. 19 is marked for identification. No. 17, 18, 21 and 22 are in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 18.)

(The document referred to was marked Plaintiff's Exhibit No. 19 for identification.)

Q. (By Mr. Bunn): Mr. Londono, did you at that conference on July 31——

I am about to show him a document No. 11, dated July 31, directed to Citizens Bank, bearing what purports to be his signature.

Q. ——sign that document in the bank?

A. Yes.

Q. On Wednesday, the 31st?

A. The 31st; yes.

Q. Do you know any reason why that paper appears to have been cut off at the top?

A. Yes, because it was written in the bank.

Q. It was written in the bank? [254]

A. Yes.

Q. On a bank letterhead?

(Testimony of J. B. Londono.)

A. It was dictated by Mr. Schroeder to the secretary and I signed it.

Q. Who cut off the top?

A. Maybe Mr. Schroeder or the secretary.

Q. Was the top letterhead portion cut off before you signed it? A. I can't say that.

Q. Did you cut it off?

A. Maybe Mr. Schroeder cut it off in my presence.

Q. Anyway, the bank wrote it? A. Yes.

Q. And you signed it? A. And I signed it.

Mr. Bunn: I offer as Plaintiff's Exhibit No. 11 this original letter.

The Court: Admitted.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 11.)

Q. (By Mr. Bunn): Do you remember whether or not you heard the dictation of that letter?

A. No.

Q. You mean you do not remember? [255]

A. I do not remember.

Mr. Hubert Morrow: Is that a carbon copy that is signed or is it a ribbon copy?

Mr. Bunn: It is the original document.

Mr. Hubert Morrow: I didn't ask you that. I have not seen it.

Mr. Bunn: I am sorry. The court has the original. Here is a copy.

(Exhibiting document to counsel.)

(Testimony of J. B. Londono.)

Mr. Bunn: It is my No. 11, and I am only offering the original. At the time I prepared that list I did not have the original and I didn't know whether I would have it at the time of the offer or not.

Mr. Hubert Morrow: Very well.

Mr. Bunn: On my list there is only one document No. 11 and it is now that original which the court has.

The Court: It is in evidence.

Q. (By Mr. Bunn): Now, Mr. Londono, I show you this document No. 9, which is a photo-static copy of a letter headed Los Angeles, California—I show you the original No. 9—a letter in Spanish—

Mr. Dasteel: What date?

Mr. Bunn: On my list I show it as a copy but they have now supplied me with the original. [256]

The Court: You say No. 9 or 11 in Spanish?

Mr. Bunn: It is a letter in Spanish.

The Court: I see. A letter in Spanish.

Mr. Bunn: Yes.

Mr. Diether: I don't believe it is a letter, it is an invoice.

Mr. Bunn: It is in Spanish. It is a document. It is a writing.

Mr. Dasteel: What is the date?

Mr. Bunn: July 24, 1946.

Q. I ask you, Mr. Londono, if that document contains your signature? A. Yes.

Q. Now I call your attention to the date of

(Testimony of J. B. Londono.)

July 24th in Spanish, and ask you if you remember when you signed that document?

A. The 27th of July.

Q. On Saturday? A. Yes.

Mr. Bunn: May I ask that the interpreter read the document into the record and then I will offer it.

Mr. Laven: For the purposes of our trial here, can't we have this translated into English and have copies of it made available?

The Court: Somebody is going to buy a transcript [257] some day and you can read it then.

Mr. Laven: Not at that late stage, but during the trial, so that if these could be translated we would have copies without having to go to the transcript.

Mr. Bunn: I will be glad to have copies of the translation made for you and submit to each of you a copy.

Mr. Laven: Thank you.

The Interpreter: What shall I do?

The Court: Read it in English.

Mr. Diether: Including all of the heading as well.

The Interpreter: This is a letterhead from J. B. Londono, representations, agencies, Medellin, Colombia, S. A., Central Building, telephone 10512, post office, air mail 979, cable and telegrams, Jotabe, spelled J-o-t-a-b-e.

In typewriting, Los Angeles, California, July 24, 1946.

(Testimony of J. B. Londono.)

Addressed to Senor Don, D-o-n—that is a title in Spanish equivalent to esquire—Alberto Echavarría, Medellin (Colombia).

On account with J. B. Londono, Los Angeles, California.

This appears to be a statement, accounting statement.

1000 tons galvanized barbed wire, new, double twist, at U. S. 160 dollars per ton cif Colombian port.

Then debit to the right-hand side of the paper.

U. S. 160,000 dollars. Then in letters, one hundred sixty thousand dollars. [258]

Double space.

Credit, No. 3578 of Citizens National Bank of Los Angeles. One line.

Second line: Ditto mark, No. 4036 of Banco Commercial Antioqueno, Medellin. And then in parentheses Colombia abbreviated, C-o-l, end of parentheses, period.

Signed J. B. Londono.

That is all that is on the document.

Mr. Bunn: The document has also been marked and now bears the marking, "Plaintiff's 3, P. S. Noon," who was the reporter who took the deposition.

Q. Now, Mr. Londono, you said you signed that on the 27th? A. Yes, the 27th.

Q. What did you do with it?

The Court: Whereabouts?

Q. (By Mr. Bunn): Yes, where were you?

(Testimony of J. B. Londono.)

A. At the bank, Citizens National Bank.

Q. In whose presence?

A. Mr. Schroeder's presence.

Q. What did you do with it?

The Court: Did you write it before you took it over there?

The Witness: Yes, your Honor, but I signed it in the [259] bank.

Q. (By Mr. Bunn): What did you do with the paper?

A. I delivered it to the foreign department of the Citizens National Bank.

Q. To Mr. Schroeder himself?

A. I can't say to Mr. Schroeder, but someone in the foreign department of the bank.

Q. But to the bank? A. Yes, to the bank.

Mr. Bunn: We offer that as Plaintiff's Exhibit 9 in evidence.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit No. 9 and received in evidence.)

Mr. Diether: Do I understand that you are going to have an English translation attached to that exhibit and made a part of it?

Mr. Bunn: I shall. I would like to have over the week end to do that, if I may.

What is No. 8, Mr. Stacey?

The Clerk: This photostatic copy.

(The document referred to was passed to counsel.)

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): I am showing the witness an original document dated [260] July 29, 1946, from the bank, that is, on the bank's letterhead, signed W. Glen Powers, Pro-Manager, directed to J. B. Londono, and ask you, Mr. Londono, if you ever saw that document before?

Mr. John Morrow: What number on your list, Mr. Bunn?

Mr. Bunn: No. 8.

The Witness: Yes.

Q.. (By Mr. Bunn): When did you first see that?

A. The 31st of July when Mr. Schroeder handed it to me in the bank.

Q. Do you remember whether or not it was on the second floor of the bank at Mr. Schroeder's office or down on the main floor where you signed the note?

A. It was in the bank. I don't remember if on the second floor or the first floor.

Q. But it was handed to you?

A. By Mr. Schroeder personally.

Mr. Bunn: I offer this in evidence.

The Court: On Exhibit No. 9 some of the typing is in black lettering and some in red lettering in a different type. Was it in that shape when you took it to the bank or did you put the red lettering on there?

The Witness: No, I put the black lettering only. The red lettering is the translation from Spanish done at the [261] bank.

(Testimony of J. B. Londono.)

The Court: At the time you signed it?

The Witness: After, I think, your Honor.

The Court: Well, that was not in that condition when you signed it?

The Witness: No.

The Court: Just the black lettering was there when you signed it?

The Witness: Yes, your Honor.

The Court: Very well.

Mr. Bunn: We offer this as Plaintiff's Exhibit No. 8, your Honor.

Mr. Diether: In that connection, your Honor, this Exhibit No. 8 for identification that the witness has just identified, you will note that there is a typewritten statement at the bottom that there is a receipt attached. The witness has not produced that receipt or it is not attached to the letter at this time.

Mr. Bunn: I will clear that up.

Mr. Diether: Do you wish to do that now?

The Court: Have you offered it in evidence?

Mr. Bunn: I am offering it now.

The Court: I think you had better clear it up first.

Mr. Bunn: All right.

The Court: When did he say he got that? [262]

Mr. Bunn: He got that on Wednesday, the 31st.

The Court: Very well.

Q. (By Mr. Bunn): I call your attention to the fact that it is dated July 29, Mr. Londono.

A. Yes.

(Testimony of J. B. Londono.)

Q. Which was Monday.

A. But it was delivered to me the 31st.

The Court: And you had not seen it before the 31st?

The Witness: I haven't seen it before the 31st.

Mr. Hubert Morrow: This refers to Exhibit 8?

The Court: To Exhibit 8.

Q. (By Mr. Bunn): Now, Mr. Londono, is that letter in the exact form in which it was delivered to you by Mr. Schroeder on the 31st, the face of it?

A. It is.

Q. Now I call your attention to the fact that this letter says, "Gentlemen, we have today made the following payment for your account under your number (blank), our number 3645, issued in favor of Dulien Steel Products, Inc., Los Angeles, California, foreign amount, rate, U. S. dollars 214,000 correspondence commission and charges, our commission of one-quarter of 1 per cent, \$535, interest for (blank) days at (blank) per cent— [263]

Mr. Diether: You don't have to read it all.

Mr. Bunn: I am going to ask him something about it.

And that it says: "This payment has been made against the following documents which we enclose, 1 Bill of Lading, 1 Invoice," and that there is an asterisk immediately to the left of the figure 1 Bill of Lading, and at the bottom of the document an asterisk between certain of the words, where it says "Documents marked asterisk have been delivered

(Testimony of J. B. Londono.)

to Mattoon & Co., as per your instructions and attached receipt."

Q. Now I ask you, did you at that time actually receive any documents with this letter?

A. No.

The Court: Was there a receipt attached to it, anything attached to it?

The Witness: Nothing, your Honor.

The Court: Just that one piece of paper?

The Witness: Yes, your Honor.

The Court: Was any receipt shown to you?

The Witness: Let me see. At the same time Mr. Schroeder got me the invoice.

The Court: You mean he showed you the invoice?

The Witness: He delivered it to me.

The Court: He delivered to you the invoice?

The Witness: Yes.

The Court: That is the freight bill? [264]

The Witness: No, the commercial invoice made by Dulien, commercial invoice.

Mr. Bunn: I am looking to see if I have the document he is referring to.

The Court: Is that Exhibit A attached to the complaint?

Mr. Bunn: No, sir.

The Witness: Mr. Bunn, you have the white copy of that invoice.

Mr. Bunn: Mr. Stacey, I think you have the original.

The Court: It does not appear to be listed here.

(Testimony of J. B. Londono.)

Mr. Bunn: It is No. 6.

(The document referred to was passed to counsel.)

The Court: What date was that, July 31?

The Witness: July 31, after 12:00 o'clock.

The Court: After 12:00 o'clock?

The Witness: Yes.

Q. (By Mr. Bunn): Now I show you No. 6 for identification, entitled "Invoice Order No. 069910," on the printed heading of Dulien Steel Products, Inc., of California, and ask you if that is the document you last referred to as an invoice delivered to you on the 31st? A. Yes, it is.

Mr. Diether: Is that your No. 6?

Mr. Bunn: That is my No. 6. [265]

Q. And delivered to you by whom?

A. By Mr. Schroeder in the bank.

Mr. Bunn: It bears date, gentlemen, it says invoice date 7-29-46, date ordered 7-12-46, date shipped 7-29-46, Invoice No. 5795, freight charges prepaid f.o.b. point Los Angeles.

We offer that as Plaintiff's Exhibit No. 6 in evidence.

The Court: Let me see No. 8 also.

(The document referred to was passed to the Court.)

The Court: Mr. Londono, I understand your testimony to be that on July 31 at 12:00 o'clock noon or thereafter Mr. Schroeder handed you these two documents in the bank.

(Testimony of J. B. Londono.)

The Witness: Yes, sir.

The Court: And nothing else?

The Witness: Nothing else, except the freight bill. Yes, but I am not sure whether Mr. Schroeder handed to me or Mr. Sweeney. I was present when the bill of freight was delivered, was handed, but I am not sure whether I take it in my hands or Mr. Sweeney take it with his hands.

The Court: Very well.

Mr. Hubert Morrow: I thought I heard him say Powers.

The Witness: Schroeder.

Mr. Diether: Just a moment, your Honor, before you rule on that.

Mr. Hubert Morrow: We would like to examine both 6 and 8, Mr. Bunn, before the court rules.

Mr. Bunn: I am about to offer another one in connection with it. You would like to see them all probably together. [266]

Mr. Hubert Morrow: All right.

The Court: What do you want that marked as 8-A?

Mr. Bunn: Yes.

(The document referred to was marked Plaintiff's Exhibit No. 8-A for identification.)

Q. (By Mr. Bunn): I show you what purports to be a carbon copy of No. 8, except that this carbon copy appears to bear your signature.

A. Yes.

Q. Is that correct?

A. That is correct.

(Testimony of J. B. Londono.)

Q. That is, to a receipt form stamped at the bottom of it which says, "Received from Citizens National Trust & Savings Bank of Los Angeles the within described enclosures."

A. That is my signature.

Q. Did you sign this carbon copy then?

A. Yes.

Q. And delivered it to whom?

A. To the bank.

Mr. Bunn: We offer this as Exhibit 8-A in evidence. And now, Mr. Morrow, when the Court gets through with them I will show them all to you.

Mr. Laven: Just a minute, before the offer is ruled on.

The Court: Very well. You all want to see [267] them.

Where does it say received.

Mr. Bunn: Down in the lower left-hand corner.

The Court: I see. It is very difficult to read, I will say.

Mr. Bunn: I had on my glasses but I can see it.

(The documents referred to were exhibited to counsel.)

Mr. Diether: This might be an appropriate time for the recess, your Honor.

The Court: Very well. We will have a short recess.

(Short recess.) [268]

The Court: Proceed.

(Testimony of J. B. Londono.)

Mr. Bunn: I will now offer in evidence No. 6, which is Dulien Steel Products——

Mr. Dasteel: That has already been offered.

Mr. Bunn: No, it wasn't received. I am asking the Court to receive it now, there being no objection, as I understand it.

The Court: No. 6, 8 and 8-A were being examined during the recess.

Mr. Bunn: I now ask the Court to receive No. 6 in evidence.

Mr. Hubert Morrow: No objection.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit No. 6, and was received in evidence.)

Mr. Bunn: And I now ask permission to withdraw my offer in evidence of 8 and 8-A and let them merely be marked for identification at this time.

The Court: So ordered.

Mr. Bunn: Now, my attention at the recess was called to the fact that document No. 1, which is the letter which the interpreter read, or the statement which the interpreter read into the record, and which was offered and received as an original is an executed carbon duplicate.

Mr. Diether: That is Exhibit 9, isn't it? [269]

Mr. Dasteel: Is it No. 1 or No. 9?

Mr. Bunn: No. 9 I am talking about.

Mr. John Morrow: Mr. Bunn, may I suggest

(Testimony of J. B. Londono.)

that you refer to the document on your list when you start out. We can't tell what you are talking about at any time.

The Court: You mean at any time?

Mr. John Morrow: I mean when he starts out, your Honor.

Mr. Bunn: I am sorry. I won't make any more mistakes, I promise.

The Court: You are now talking about document 9 or document 1?

Mr. Bunn: Document 9.

Mr. Hubert Morrow: That is an exhibit.

The Court: That is in evidence.

Mr. Bunn: But I offered it and it was received upon my statement that it was an original. My attention has been called by Mr. Diether and Mr. Schroeder to the fact that it is an executed duplicate but that it is actually a carbon writing.

The Court: Very well.

Mr. Bunn: And with that explanation I want to ask Mr. Londono, and do now:

Q. If at the time that that was signed by you and delivered to the bank, did you sign and deliver any other exactly similar documents? [270]

A. Yes, I delivered three.

Q. Three signed ones? A. Yes.

Q. To the bank?

The Court: All identical with that?

The Witness: Yes.

Mr. Bunn: All right. That clears it I think.

Q. I show you No. 7 for identification, an orig-

(Testimony of J. B. Londono.)

inal freight bill, and calling your attention to the face of it, the front of that document, I ask you if you ever saw that before? A. Yes.

Q. When did you first see that document?

A. July 31, 1946, at the Citizens National Bank.

Q. Who was in your immediate presence when you first saw it?

A. Mr. Sweeney and Mr. Schroeder.

Q. In whose hands, if any, was the document when you first saw it?

A. In Mr. Schroeder's or Mr. Sweeney's hands.

Q. You don't remember which?

A. No, I can't remember.

Q. Was there then any conversation between any of the three of you about that document?

A. Yes. [271]

Q. What was the conversation?

A. Mr. Schroeder required from Mr. Sweeney and from myself to have the endorsement of this document from Dulien.

Q. What did he ask?

A. He asked to obtain the endorsement of the document.

Q. Is that all? A. That is all.

Q. What then, if anything, did you do?

A. I went to the Dulien's office?

Q. Alone?

A. With Mr. Sweeney, and obtained from Mr. Stanley the endorsement in the back of the paper.

Q. Will you turn that over, please, and look at the reverse side of it? A. Yes.

(Testimony of J. B. Londono.)

Q. When you left the bank was any of that on the reverse side that is on there now?

A. Nothing.

Q. And did you see it put on there, that endorsement?

A. Yes, it was in my presence.

Q. Who typed it?

A. Mr. Stanley himself.

Q. Did you see Mr. Stanley sign it?

A. Yes, sir, I saw him.

Q. Where did that take place? [272]

A. At Dulien's offices, South Alameda Street.

Q. Was there present then and there any other person that you and Mr. Sweeney and Mr. Stanley?

A. Not that I remember.

Q. Was Mr. Stanley's signature affixed thereto in Mr. Sweeney's presence as well as in yours?

A. Yes.

Q. Do you remember any conversation which then and there took place between the three of you?

A. No.

Mr. Bunn: May that then be marked for identification at the present time?

The Court: So ordered; No. 7.

(The document referred to was marked Plaintiff's Exhibit 7, for identification.)

Q. (By Mr. Bunn): Now, Mr. Londono——

The Court: Before you get on another subject, may I see Exhibit 6?

(The document referred to was passed to the Court.)

(Testimony of J. B. Londono.)

The Court: I understood your testimony to be, Mr. Londono, that on Exhibit 11, that was handed to you, or dictated at the bank on July 31, and you signed it at that time?

The Witness: Yes, sir.

The Court: And that on the same day you received Exhibit [273] No. 5, this commercial letter of credit.

The Witness: Yes, your Honor.

The Court: That was the same occasion at the bank, or had you been in and out?

The Witness: It was on the same day.

The Court: At the same time?

The Witness: More or less it was in the same hour of the day.

The Court: Did you give them this letter of July 31, 1946, before they handed you No. 6?

The Witness: I can't say that.

The Court: You do not remember?

The Witness: I don't remember that.

The Court: What did you do with this commercial invoice after you got it?

The Witness: I delivered it to Mr. Bunn.

The Court: You kept this with you until you delivered it to Mr. Bunn?

The Witness: Yes, your Honor.

The Court: This never went to Mattoon & Company?

The Witness: No, sir.

Mr. Hubert Morrow: What number is that, your Honor?

(Testimony of J. B. Londono.)

The Court: No. 6, the commercial invoice, so-called.

Very well. That is all I have.

Mr. Bunn, you were going to move on to another subject, [274] I believe.

Mr. Bunn: Yes.

Q. Mr. Londono, do you remember in whose physical possession this freight bill was on the trip from the bank to Dulien's office, yours or Mr. Sweeney's? A. In mine, in my possession.

Q. Now, after Mr. Stanley affixed his signature to that endorsement on the back of that freight bill, what did you do?

A. I went to Moore-McCormack Lines pier.

The Court: Did Stanley give it to you or Sweeney?

The Witness: The document was given to me by Mr. Stanley after the endorsement was made.

Q. (By Mr. Bunn): And you went then where?

A. I went to the Moore-McCormack pier to see some wire that the day before we ordered to move from the Long Beach dock.

Q. Did Mr. Sweeney accompany you there?

A. Yes.

Q. Approximately what time of day was that?

A. It was in the afternoon about 4:00 o'clock.

Q. And what did you observe at the Moore-McCormack pier?

A. I saw a lot of barbed wire, very rusty wire, and I asked Mr. Sweeney, "Don't ship that wire to Colombia because it was——" [275]

(Testimony of J. B. Londono.)

Mr. Diether: Just a moment. I can't hear him.

The Court: I asked Mr. Sweeney, "Don't ship that wire to Colombia because——"

The Witness: "——it was very rusty wire and I was obligated to ship good wire to Mr. Echarria."

Mr. O'Malley: I am confused whether this is conversation or a conclusion.

The Court: This is what he said to Mr. Sweeney at the pier, according to his testimony.

The Witness: And Mr. Sweeney promised to me to call people to select the wire, to separate the good wire from the bad wire, and I accepted.

Q. (By Mr. Bunn): You mean you accepted Mr. Sweeney's suggestion? A. Yes.

Mr. Dasteel: Just a moment. I object.

The Court: The objection is sustained to the question.

Mr. Diether: And the answer may be stricken then?

The Court: The word "Yes" will be stricken.

Mr. Dasteel: I ask that the statement volunteered by the witness to the effect that Mr. Sweeney promised certain things, I think he should say what Mr. Sweeney said.

The Court: We understand that. He is doing the best he can. He is doing pretty good, too, in English.

The Witness: Thank you, your Honor. [276]

The Court: Now go ahead with your conversation with Sweeney at the pier.

(Testimony of J. B. Londono.)

The Witness: We spent a lot of time at the pier looking at all the wire.

Q. (By Mr. Bunn): At the Moore-McCormack pier?
A. At the Moore-McCormack pier.

The Court: Let us clear this up now, what Sweeney said you or you said to him about segregating the wire.

The Witness: Yes. He said that he will call some people who used to do that kind of jobs and he will let me know how much it cost, and we went to the office the same day, the same afternoon, and nothing else that day.

Q. (By Mr. Bunn): You mean back to the Los Angeles office?
A. Yes.

Q. Of Sweeney?
A. Yes.

Q. Mattoon & Company?

A. Mattoon & Company.

Q. Now, that is Wednesday afternoon, the 31st?

A. Yes, sir.

Q. Did you on that day make any effort to communicate with Dulien?

A. Not that day. [277]

The Court: You mean later? He had already communicated with him.

Mr. Bunn: Later I mean; yes.

Q. Did you later that day do anything else in regard to this barbed wire, that day?
A. No.

Q. The next day on the calendar would be August 1st?
A. August 1st.

Q. Thursday?

(Testimony of J. B. Londono.)

A. Yes. I went to Mattoon's office.

Q. Let me ask you, what did you do on August 1st about the barbed wire? A. Yes?

Q. What did you do?

A. I went to Mattoon's office to see Mr. Sweeney and asked him what about the designation I asked the day before, and he told me that he called some people, I don't remember the names, and say that the segregation will be made the same day or the next day, and I know that it was made because some charges, some invoices, was presented to me by Mr. Sweeney.

Q. Now let's proceed with anything you did——
Mr. Diether: Just a moment.

The Court: The latter portion of it may be stricken as a conclusion.

Mr. Diether: Thank you. [278]

The Court: Except the portion that he said he later received an invoice.

Mr. Bunn: Is that clear, Mr. Morrow?

Mr. Hubert Morrow: Yes.

The Witness: Then the same day in the morning——

Q. (By Mr. Bunn): August 1st?

A. August 1st, in the presence of Mr. Sweeney I dictated a letter to his secretary, Miss Betty, a letter to Dulien Steel Products, stating that the quality of the wire——

Q. Just a moment. I will show you a letter.

Gentlemen, I have in hand document No. 23 for

(Testimony of J. B. Londono.)

identification, but my list shows a copy of it. I now have the original of it, and I ask the witness if that is the letter he refers to.

Mr. Dasteel: What is the date?

Mr. Bunn: August 1, 1946, a letter to Dulien Steel Products, Inc.

Q. Is that the letter you referred to?

A. Yes, it is. I mailed it myself.

Q. Does it bear your signature?

A. Yes, it is.

Q. You took it yourself to the post office?

A. Yes.

Q. In the envelope which is attached to it [279] now? A. Yes.

Q. And had it registered?

A. Registered; yes.

The Court: I take it, Mr. Bunn, the letter was handed to you by Mr. Dasteel in court this morning?

Mr. Bunn: Yes, sir.

The Court: Very well.

Q. (By Mr. Bunn): And except for the stamp which bears "Received, August 2, 1946" in the upper right-hand corner of that document, is that letter on its face exactly as you mailed it to Dulien?

A. Yes, it is.

Q. In the attached envelope?

A. Yes, it is.

Mr. Bunn: We offer that as Plaintiff's Exhibit No. 23.

The Court: Admitted.

(Testimony of J. B. Londono.)

(The document referred to was marked Plaintiff's Exhibit 23, and was received in evidence.)

Q. (By Mr. Bunn): Now, do you remember about whether that was in the morning or afternoon of August 1st?

A. It was in the morning.

Q. And did you have any contact later that day with anybody from Dulien's place? [280]

A. No.

Q. When did you next have any contact with anybody from Dulien's place?

A. August 5th of July, 1946.

Q. Pardon? A. August 5, cinco.

Q. That was Monday, wasn't it?

A. I don't know.

Q. You are sure it was August 5th?

A. August 5th; yes.

Q. With whom did you then have contact?

A. Mr. Sweeney, Mr. Rendon and I went to Mr. Dulien's office and saw Mr. Grinstein, and asked him to go to the dock to see the wire, and he accepted to go with us. Then we went in Mr. Rendon's car to the dock, Pier A.

Q. A little louder, please.

A. We went to the dock with Mr. Grinstein and in the presence of the wire he expressed——

Q. Who?

A. Mr. Grinstein—surprise and say that he can't understand——

Mr. Diether: Just a moment.

(Testimony of J. B. Londono.)

Mr. O'Malley: One minute, please. The witness has said that Mr. Grinstein expressed surprise. I ask that that be stricken. [281]

The Court: Let him finish his answer and we will see.

The Witness: And say that he can't understand why Mr. Dulien told him that the wire was good. He don't know. And added that this business is going to make it crazy to him.

The Court: Going to do what?

The Witness: It is going to make it crazy to him.

Mr. Dasteel: I would like the interpreter to get that statement in Spanish.

The Interpreter: Mr. Grinstein said that Mr. Dulien had told him that the quality of the wire was good, that inasmuch as it wasn't so, that it was going to make him crazy handling it.

Mr. Diether: What was the last word?

The Interpreter: Handling.

The Court: Handling the wire.

The Interpreter: Handling the sale of the wire, I suppose.

Mr. Diether: Ask the witness if that is what he means.

The Interpreter: That he was distressed to have sold the wire as good, being in such a damaged condition.

Mr. Hubert Morrow: I don't understand it. Who was going to be driven crazy?

The Court: Mr. Grinstein.

(Testimony of J. B. Londono.)

Mr. Hubert Morrow: Mr. Grinstein?

The Court: Mr. Grinstein. The witness testified that [282] Mr. Grinstein said that it would make him crazy to handle it.

Mr. Hubert Morrow: I see.

The Court: Because of its condition.

Q. (By Mr. Bunn): Anything else said in that conversation?

A. Yes. We went to the boat——

Mr. Dasteel: Who?

The Witness: Mr. Grinstein, Mr. Sweeney, Mr. Rendon and I, and because some wire is coming, it was coming from the boat directed to cars for Gonzalez & Blanco, Mr. Grinstein protest and asked to have the same right, in other words, to have the right to take the good wire from the boat, to direct it. At that time we saw on the dock chalk marks, white chalk marks, "Dulien Steel Products" and "Gonzalez & Blanco." On the right a big pile marked "Gonzalez & Blanco" and on the left a big pile marked "Dulien Steel Products." There was no marks with Londono.

Q. (By Mr. Bunn): Was there any noticeable difference between the quality of the wire in those two piles?

Mr. Dasteel: I object to that, your Honor. That calls for a conclusion of the witness. It would be impossible for him to testify as to a difference, the degree of difference.

The Court: He can testify to what he saw. [283]

Q. (By Mr. Bunn): Did you see any difference?

(Testimony of J. B. Londono.)

A. Yes. All the wire looked like the same wire, but the difference I saw. It was that on the right pile, Gonzalez & Blanco, I saw smaller coils than the other pile.

Q. More small coils?

A. Small coils, 28-pound coils.

Q. What did you see about the quality of the wire in the two separate piles?

A. It looked bad quality all over.

Q. I didn't get the answer.

A. It looked rusty, all of it, with the exception of the wire coming from the boat directed to the cars for Gonzalez & Blanco.

Q. When you say coming, you mean then being moved?

A. The wire that was going or was being unloaded from the boat to the cars that belonged to Gonzalez & Blanco was decidedly of a better quality. It was being picked up in the holds of the boat.

The Court: What did Mr. Grinstein say?

The Witness: He said that he want to have the right to do the same.

The Court: Who did he say that to?

The Witness: To the man in the dock, to the man in the boat. [284]

The Court: To a man in the boat?

The Witness: Yes.

The Court: What did the man in the boat say?

The Witness: I can't remember what he say, your Honor.

Q. (By Mr. Bunn): What did you say?

(Testimony of J. B. Londono.)

The Court: He said he can't remember what he said. Do you remember whether or not he said yes or no? That cannot be leading and suggestive, because you cannot lead a person in both directions.

The Witness (Through interpreter): That answer from the man in the boat must have been in the negative, because Mr. Grinstein continued arguing.

The Court: What did Mr. Grinstein continue to say?

The Witness: We take the car again to the office, and I asked him for the right of the renegotiation of the price of the wire, and he offered me to wait, or he asked me to wait until the complete discharge, unloading, and then promised me that we will renegotiate the wire.

I asked Mr. Grinstein, I remember well, "Who is going to pay the segregation of the wire?," and he said that I must pay.

The Court: Did you ask him for all good wire?

Mr. Diether: Asked who?

The Court: Mr. Grinstein. [285]

The Witness: Yes, I asked for good wire. I told him that I bought good wire from Dulien and I want to have good wire, and he asked me to wait for the complete unloading, take the best wire, then Dulien will remove 300 tons of wire and we will renegotiate the black, the bad wire.

Mr. Diether: Will you read that answer, Mr. Reporter?

The Court: I could not do that because Matson refused to give me the right to select the wire.

(Testimony of J. B. Londono.)

Mr. Diether: Before that, your Honor.

Mr. John Morrow: We move to strike the witness' answer with respect to what Matson did as being not responsive.

The Court: Let us hear the whole answer.

(The answer referred to was read by the reporter as follows: "A. Yes, I asked for good wire. I told him that I bought good wire from Dulien and I want to have good wire, and he asked me to wait for the complete unloading, take the best wire, then Dulien will remove 300 tons of wire and we will renegotiate the black, the bad wire. But I could not do that because Matson refused to give me the right to select the wire.")

The Court: Is that what you told Grinstein?

The Witness: Yes, in the car on the way back from the pier to Dulien's office. [286]

The Court: The motion to strike is denied.

Mr. Hubert Morrow: Is it clear that your Honor's question referred to that conversation at that time? The witness now says something that sounds to me like it might have been a later conversation.

The Court: The witness has testified that he, Mr. Sweeney and Mr. Rendon and Mr. Grinstein, went to the Harbor, and this is all part of the same transaction.

The Witness: Yes, sir.

The Court: They went down there, and your

(Testimony of J. B. Londono.)

conversation on the dock and this is on the way back?

The Witness: Yes.

The Court: And in the office?

The Witness: Yes, sir. [287]

* * *

Q. Mr. Londono, in that conversation on the 5th that you have just been telling about, when you went back to Dulien's [288] office, did you then tell Mr. Grinstein that Matson would not let you select?

A. No.

Mr. Diether: I object to that as leading and suggestive.

* * *

The Court: I think it is leading and suggestive, but I have overruled the objection because the question is calculated to elicit some clarity concerning this conversation. The objections are [289] overruled.

* * *

Q. (By Mr. Bunn): Do you remember anything else of the conversation on that day?

Mr. Hubert Morrow: What day?

Mr. Bunn: On the 5th, with Grinstein.

The Witness: No.

Mr. Diether: Where? At the dock or any other place?

Mr. Bunn: He has taken us from those persons, from the dock back to Grinstein's office.

Mr. Diether: I hadn't heard anything about the office.

(Testimony of J. B. Londono.)

The Court: Yes, he testified that he got back to the office, and after he got back to the office Grinstein told him to wait for the complete unloading and they would segregate the good wire from the bad, Dulien would take 300 tons, he could take his good wire, and they would renegotiate the price on the bad wire.

Mr. Diether: I understood that was on the dock.

The Court: That was at the office. In any event, it is [290] all part of one conversation.

The Witness: One conversation. It was on the way from the dock to Dulien's office, then we left Mr. Dulien at his office.

The Court: Dulien?

The Witness: Mr. Grinstein, at his office, at the door.

The Court: You left him at the door?

The Witness: Yes. And one day later, or two days later, I went Mr. Dulien's office again and I received from him one letter confirming the conversation we had at the dock.

Mr. Dasteel: Your Honor, please, I object to this, that it is voluntary. He is leaving August 5th and he is two days ahead now.

The Court: Yes, it is voluntary.

Let me ask you a question: Mr. Sweeney was at the dock with you?

The Witness: Yes, sir.

The Court: Did you talk to the man on the boat?

The Witness: No.

(Testimony of J. B. Londono.)

The Court: Did Mr. Sweeney talk to the man on the boat about getting good wire?

The Witness: Not that I remember, your Honor.

The Court: Were you with Mr. Sweeney all the time?

The Witness: He was in the same place, he was in the [291] dock, but I don't remember very close to me.

The Court: Your conversation concerning getting good wire then was with Mr. Grinstein?

The Witness: Yes, sir.

The Court: And his conversation was with the man on the boat?

The Witness: Yes, sir.

Q. (By Mr. Bunn): Now, that was the 5th of August. When did you next have any contact after the 5th of August with Dulien? A. The 7th.

Mr. Dasteel: Pardon me, Mr. Bunn.

Mr. Bunn: I mean, anybody at Dulien's place?

Mr. Dasteel: A representative?

Mr. Bunn: Some person. Unless I say Mr. Dulien, when I say "Dulien" I mean Dulien's outfit.

The Witness: The 7th of August, 1946.

Mr. Bunn: May I have document No. 25, please?

(The document referred to was passed to counsel.)

The Court: These are all for identification, so you can refer to them as Exhibit 25 for identification.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): What contact did you have with anybody at Dulien's on the 7th of August?

A. I went to Mr. Grinstein's office and [292] required—

Q. Alone, or with somebody else?

A. With Mr. Rendon—and required from him confirmation of our statement. That means that I will take the best wire from the pile, then remove 300 tons of wire, and then we will renegotiate the wire. I want to have something in writing on that.

Q. Did you then get anything in writing?

A. Yes, one letter from Mr. Grinstein.

Q. I show the witness document No. 25—

Mr. Dasteel: What date?

Q. (By Mr. Bunn): —and ask you, Mr. Londono, when you received that letter?

The Court: It is dated August 7th.

The Witness: The 7th of August.

Q. (By Mr. Bunn): Was it handed to you?

A. Yes, it was handed to me by Mr. Grinstein in his office in Mr. Rendon's presence.

Q. Did you see him sign it?

A. Yes, I saw him.

Q. Did you hear him dictate it? A. Yes.

Q. Now, is this the document, except for the blue pencil number 25 and the purple ink notation, "Defendant Citizens Bank's [293] Exhibit A, P. S. Noon," and the penciled notations on the bottom?

A. Yes.

Q. Is that the letter? A. It is.

(Testimony of J. B. Londono.)

Mr. Bunn: We offer that as Plaintiff's Exhibit 25.

The Court: Admitted.

Mr. Laven: Pardon me, your Honor. May we see that before your Honor rules?

The Court: Very well. Let me look at it first.

(The document referred to was passed to counsel.)

(The document, heretofore marked Plaintiff's Exhibit 25 for identification, was received in evidence.)

Q. (By Mr. Bunn): Now, do you remember what time of day that was that you received from Mr. Grinstein's hands that letter?

A. No, I don't remember what time.

Q. Have you told us what you remember of the conversation that took place at the time of the delivery of that letter—Withdraw that.

What conversation did take place?

The Court: I thought he has already related that.

Mr. Bunn: I thought he just said Mr. Grinstein gave him the letter.

The Court: No, he related the conversation. He said he [294] went there and wanted confirmation in writing.

Q. (By Mr. Bunn): Did you have any further contact later that day with anybody at Dulien's place? A. No.

(Testimony of J. B. Londono.)

Q. What did you do with that letter after you got it? A. I kept it.

Q. You kept it? A. Yes. [295]

* * *

Q. Mr. Londono, you have testified that on July 31 for the first time you saw as identified for you some of the barbed wire, that you saw it on the Moore-McCormack dock? A. Yes.

Q. Now, I am asking you whether or not you at any time gave any instructions to anybody after your observance of that wire on the 31st about the movement of that wire? A. Yes.

Q. To whom did you give such instructions?

A. I instructed Mr. Sweeney to ship all good wire from that particular lot of wire, move it to Moore-McCormack Lines.

Q. You mean to pick out the good?

A. Pick out the less bad and more usable and ship it to Cartagena, Colombia.

Q. Did you give any instructions about what to do with the other of that portion that was at Moore-McCormack's?

Mr. Dasteel: Just a moment. He hasn't said the date that he gave that particular instruction.

The Court: He has not been asked. [296]

Q. (By Mr. Bunn): When did you give that instruction to Mr. Sweeney?

A. At the time we went to the dock, the 31st of July.

Q. Did you likewise give him any instructions

(Testimony of J. B. Londono.)

about what was to have been done with the portion that was not good?

A. I asked him to refuse that. [297]

* * *

Mr. Bunn: I am about to show the witness the check which I showed to counsel, which is not on my list of exhibits.

Q. I show you, sir, check No. 127, dated July 31, 1946, for \$54,535, appearing to be payable to the Citizens Bank, and ask you if that is your signature on that check? A. Yes, it is.

Q. And when did you sign it?

A. The 31st of July.

Q. To whom did you deliver it?

A. To Mr. Schroeder in the bank.

Q. And what does it represent?

A. It represented the payment of the balance between the amount of \$214,000 paid for the wire to Dulien and the money I got out of the bank, \$160,000, that I received from Columbia.

Q. And you actually had borrowed this money from the [298] bank? A. From the bank, yes.

Q. And the bank had put that in your bank account? A. Yes.

Q. You then gave the foreign department a check back for that amount? A. Yes, sir.

Mr. Bunn: We offer that as Plaintiff's Exhibit 37.

The Court: Admitted.

(Testimony of J. B. Londono.)

(The document referred to was marked Plaintiff's Exhibit No. 37 and received in evidence.)

Mr. Diether: I thought 37 was the barbed wire samples.

The Court: No, No. 36 is the barbed wire samples.

Q. (By Mr. Bunn): Now, Mr. Londono, between August 7, 1946, and August 10, 1946, did you do anything about the barbed wire?

A. In particular, I don't remember. I remember well that after the 7th, or the 9th, when the wire was finished unloaded, I was trying to sell the wire to people here in Los Angeles that required to buy the wire, but nothing in particular those two days.

Q. What, if anything, in regard to the wire happened on the 10th of August?

A. The 10th, it was Saturday. Yes, I went to the bank and—— [299]

Q. Accompanied by whom, if anyone?

A. I was alone.

Q. Whom did you see at the bank?

A. I saw Mr. Moran, Mr. Powers, and I told Mr. Powers—I inquired of Mr. Schroeder but he was out on vacation and I talked to Mr. Powers—and reported to him the transaction, the bad quality of the wire, and I wanted the bank's help.

Mr. Powers suggested I see Mr. Emshoff——

Q. Was he in the foreign department at the bank? A. Foreign department of the bank.

(Testimony of J. B. Londono.)

Now I say I was with Mr. Hector Silva Herrera, a Colombian lawyer.

Mr. Hubert Morrow: We can't hear.

Mr. Bunn: He said, I was with Mr. Hector Silva Herrera, a Colombian lawyer.

The Witness: Yes. And we saw Mr. Emshoff, who suggested to me I see Mr. Fosvett, that Mr. Emshoff and Mr. Herrera and me went down to Mr. Fosvett's office.

Q. (By Mr. Bunn): On what floor of the bank?

A. First floor of the bank, main floor.

Mr. Herrera, who speaks English all right, explained, told Mr. Fosvett about my transaction, my wire transaction, explained to him the fact that the wire was very bad because [300] he saw the wire in Long Beach the day before, or several days before, and he mentioned to Mr. Fosvett the fact that that wire it was bought by Dulien from the government for \$28 per ton and he used the word "scandal," if the wire was good the government sold it for \$28.

Mr. Fosvett listened and promised to give me any help possible.

Mr. Diether: I didn't get the first part of his answer, that this Colombian lawyer had seen the wire.

The Court: The day before.

The Witness: The day before or several days before. He went with me several times to the dock.

Mr. Diether: When you went to the Harbor?

The Witness: Yes, several times.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): Proceed, if there was any more conversation with Mr. Fosvett.

A. I can't remember more.

Q. Do you remember where you went from the bank on that Saturday morning, on August 10th?

A. Yes, I talked to Mr. Moran in his place about the condition of the wire, and Mr. Moran suggests for me to use engineers to inspect the wire, to determine the quality, percentage of the galvanized wire, black wire, rusty wire and usable wire. [301]

Then we made an appointment with Mr. Moran to see Mr. Moran at the Hotel Clark the same day after the bank closed, about 12:00 o'clock, and he called Mr. Koppel in my presence and asked for an appointment for the same afternoon at the dock in order to inspect, to start the inspection of the wire, and Mr. Koppel approved, agreed, to meet us.

Then I left the bank at that time. It was about 11:00 o'clock. Mr. Moran come to the Hotel Clark between 12:00 o'clock and 1:00 o'clock, and with Mr. Rendon in his car we went to Long Beach, Pier 1-A, and on the way we had lunch. Then we met Mr. Koppel about 2:00 o'clock in Long Beach.

Q. Did you come to my office that day at all?

A. When I left the bank and before going to the hotel I had the suggestion to see Mr. Bunn, and I went to Mr. Bunn's office and I report to him my general situation, I explained what happened.

Q. Was that the first time that you had seen me?

A. Yes, it was Saturday, the 10th.

Q. Then that afternoon what did you do?

(Testimony of J. B. Londono.)

A. About 2:00 o'clock we met Mr. Koppel at the dock.

Q. Was Mr. Bunn with you?

A. No. And Mr. Moran in English explained, told Mr. Koppel what I want, that he means to inspect the wire and make report about the percentage of the galvanized wire, the black wire, the rusty wire, the good wire, the usable wire [302] and the unusable wire too.

And Mr. Koppel agreed to start immediately to make the inspection. Then we went back to the hotel and nothing more Saturday happened.

Q. That was Saturday, August 10th?

A. Yes.

Q. Between August 10th and August 21st, generally speaking, what did you do in regard to the wire?

A. I have tried to sell the wire to people from Mexico, from Brazil, from Argentina, that knew that I had this wire, called me at the hotel, called Mr. Rendon's office and asked me for the price, then every day I take people down there to the dock and show the wire, they see the wire but I have not one offer, nobody wanted to take the wire because it was too bad.

In particular, I remember on the 12th of August I saw in the pier, Pier 1-A in Long Beach, one Mr. Swanson from Toplis & Harding, and he was inspecting the wire because Koppel, Mr. Edwin Koppel, recommended to him to make the inspection.

(Testimony of J. B. Londono.)

Mr. Diether: If your Honor please, may the portion of his answer which said that they didn't take the wire because it was too bad, be stricken as a conclusion of the witness?

The Court: No. The motion is denied. [303]

Q. (By Mr. Bunn): You say you saw Mr. Swanson? A. Swanson, yes.

Q. Inspecting the wire?

A. Yes, inspecting the wire.

Q. Go ahead.

A. I myself told Mr. Swanson that I was the owner of the wire and I explained that I wanted very complete report about the quality, and he offered to me to make the report and send it to maybe Mattoon & Company. I gave my address to him.

Q. That is the 12th?

A. It was the 12th, Mr. Bunn.

Q. Now is there anything else that you can tell us that you did about the wire but try to sell it between then and the 21st?

A. Not in particular, Mr. Bunn.

Q. Now going back to the 7th of August, on which date this morning you said Mr. Grinstein accompanied you to Pier A—— A. Yes.

Q. ——and you said this morning that you saw good wire being taken from the boat to cars for Gonzalez & Blanco—— A. Yes.

Q. ——on that same occasion, did you see any selection being made from the piles of wire which were already on the dock as distinguished from the

(Testimony of J. B. Londono.)

wire that was on the boat being taken directly to the cars for Gonzalez & Blanco?

Mr. Hubert Morrow: That was the 5th, I believe. Am I wrong?

The Witness: The 5th.

* * *

Mr. Laven: The government would like to interpose an objection to this line of testimony because there is nothing in the complaint or in any issue relative to the selection of the wire or any claim that there is any damages that have resulted by reason of permitting Gonzalez & Blanco to select, whereas Mr. Londono was not permitted to select. It is not in issue. Therefore it is not material, and we object to it on that ground.

The Court: It is part of the surrounding circumstances. It is permissible. [305]

* * *

Q. On the 5th of August, when you saw good wire being taken from the boat to cars for Gonzalez & Blanco, did you see any selection being made from the piles of wire on the dock?

A. I saw people taking wire from the piles for Gonzalez & Blanco.

The Court: Did you see any wire unloaded from the boat while you were there?

The Witness: Yes.

The Court: What would they do with the wire

(Testimony of J. B. Londono.)

that came out of the hold, they would put it in Gonzalez & Blanco's pile or in Dulien's pile or was there somebody standing around talking about, shall we give them this one or that one, or what happened?

The Witness (Through Interpreter): No. I saw the wire being unloaded all over the pier.

The Court: I understood him to say that they were taking wire direct from the boat to cars for Gonzalez & Blanco.

The Witness: Yes, your Honor.

The Court: Did they stop any place on the way or was there somebody directing what wire was to go to Gonzalez & Blanco, or did the stevedore just haul it out of the hold and take it and put it in the pile?

The Witness (Through Interpreter): He didn't know who was [306] in charge of the distribution of the wire, but he saw some wire going from the boat to the cars.

The Court: Did he see a man on the boat or on the dock directing the distribution?

The Witness (Through Interpreter): There were some people indicating where the merchandise was to be placed.

The Court: Did he know who they were?

The Witness: No.

Q. (By Mr. Bunn): Now, up to the 21st of August, did there occur—the effort you made from August 10th to the 21st resulted in no sales by you here, is that right? A. Yes, that is right.

(Testimony of J. B. Londono.)

Q. Did anything occur particularly on August 21st about this wire?

A. Not in particular that I remember.

Q. Did you at any time observe wire being taken out of the pile on the pier marked "Dulien" to cars for Gonzalez & Blanco?

A. About the 20th of August.

Q. What occurred?

A. I went to the dock, as all days, trying to show the wire to people, trying to sell the wire, and I saw people taking the best wire from all piles and I asked one gentleman what happened, and he say, he answered me that he is [307] working for Gonzalez & Blanco, and I asked him, "Why are you taking wire from all piles," and then he answered me, he had the right to have the wire from all piles.

I was surprised, and the same day or the next day I reported to you this fact.

Q. Did you hear any portion of a conversation in my office on the day you reported that to me?

A. I remember that you called Matson Navigation Company.

Q. You can't tell what they told me.

A. No, I would say that you talked to them. You called Mr. Banning in Matson Navigation Company.

Q. You heard me do that?

A. Yes, of course. You told him that you are my lawyer, that I just come from the dock and I saw people from Gonzalez & Blanco taking wire

(Testimony of J. B. Londono.)

from all piles in the dock, and after that you told me that Mr. Banning answered that he will——

Mr. O'Malley: Just a moment.

Mr. Bunn: You have answered. [308]

* * *

Q. (By Mr. Bunn): Then you left my office?

A. That is right.

Q. Then when did you next go back to the dock?

A. Practically every day after.

Mr. Diether: What day was that?

Mr. Dasteel: The 21st?

Mr. Bunn: He said that was either the 20th or—the same day as the 20th or the next day, in his language.

Q. Now, did anything occur about this barbed wire on the 22nd or the 23rd?

A. On the 23rd I remember I had taken you to the Long Beach pier to show the wire with Mr. Rendon in his car and you saw the wire.

Q. What did you see being done, if anything, then about the wire?

A. I saw people selecting the wire for Gonzalez & Blanco.

The Court: From all piles?

The Witness: All piles. Then we left the dock and stopped at Koppel's.

Mr. Bunn: Pardon me.

Q. Before you leave the dock, do you know the name of any employee of Gonzalez & Blanco whom you there met at that time? [309]

(Testimony of J. B. Londono.)

A. I think the name is Mr. Carter, I think, but I don't remember.

Q. From the dock you went where?

A. Mr. Carter, or Mr. Partridge.

Q. You don't remember, I take it, for sure?

A. No.

Q. You say we went where then?

A. Went to Koppel's office in Wilmington.

Q. And what transpired at Koppel's office? What occurred at Koppel's office?

A. I asked Mr. Koppel to try to make report of the quality of the wire, and during our conversation—I can't remember the complete conversation—he asked me the documents used on this transaction. Then I show him. I had in my pocket document that I was thinking was a bill of lading, and I showed Mr. Koppel, and I said, "This is the document."

Q. What document did you show him?

A. I showed the bill of freight, but at that time I didn't know it was bill of freight. Mr. Koppel saw the paper and said, "This isn't a bill of lading, this is a bill of freight."

Then I handed him the document I have had like a bill of lading and he said, "No, this is a bill of freight, a big difference between bill of lading and bill of freight." It was the first time I saw or I knew the fact about the document I [310] have.

Then we left Koppel's office and the next day in the morning, the 24th of August, I went to Mr. Sweeney's office and I show him the document I

(Testimony of J. B. Londono.)

called before the bill of lading, and asked him if he had another document from the bank, and he said no, he said the only document we have——

Mr. Diether: Just a moment.

Mr. O'Malley: I think the conversation with Mr. Sweeney is hearsay as to the bank.

The Court: Yes, it is hearsay.

Q. (By Mr. Bunn): You showed Mr. Sweeney the document?

A. The document, and asked him——

Q. You can't tell what Mr. Sweeney said to you.

A. I see.

Q. I will withdraw that statement. I think he can testify to the conversation when the conversation itself, not the truth of the statements made therein, is the matter in issue. He is telling of his acquisition of knowledge.

Mr. O'Malley: He has already testified to that.

The Court: Do you object?

Mr. Diether: Yes.

The Court: The objection is overruled.

Mr. Bunn: Would you read him the last question?

The Court: He was telling the conversation with Mr. [311] Sweeney.

Q. (By Mr. Bunn): Go ahead and tell the conversation with Mr. Sweeney.

Mr. Diether: Are you allowing this for the true facts or merely that he had the conversation?

The Court: That he had the conversation.

(Testimony of J. B. Londono.)

Mr. Diether: In other words, it is not offered to prove——

Mr. Bunn: It is not offered to prove the truth of what Mr. Sweeney told him, but to prove the fact of the telling.

The Court: To prove that Mr. Sweeney told him that?

Mr. Bunn: Yes, sir. Whether true or false, is another question.

The Court: You were telling the conversation with Mr. Sweeney.

The Witness: I asked him if he had another document from the bank, and he say no, the only document he had was this document. And I say Mr. Sweeney what Mr. Koppel say the day before, in other words, that it is not bill of lading, it is a bill of freight.

Then I went to your office, Mr. Bunn's office, and reported that Mr. Sweeney told me not any other document had been delivered by the bank to Mattoon & Company. Then as you remember, Mr. Bunn, we went to the bank. [312]

Q. (By Mr. Bunn): Who is "we"?

A. You and I went into the bank and had a conference with many officers of the bank, president, Mr. Fosvett, Mr. Emshoff, Mr. O'Neil.

Q. On that same day did we first talk with all the defendants or just one person?

A. The first day we talked to all officers.

The Court: Who did you first talk to when you went to the bank, Mr. Schroeder?

(Testimony of J. B. Londono.)

The Witness: I beg your pardon?

The Court: When you and Mr. Bunn went to the bank that day, who did you first talk to?

The Witness: Mr. Fosvett. Mr. Schroeder was on vacation.

The Court: Mr. Fosvett?

The Witness: Mr. Fosvett. Mr. Schroeder was on vacation.

The Court: What did you tell Mr. Fosvett?

Q. (By Mr. Bunn): What was said between you and Mr. Fosvett?

A. You take part in the conversation. I don't tell nothing to Mr. Fosvett.

Q. I beg your pardon?

A. I say nothing to Mr. Fosvett. You tell him.

The Court: What did Mr. Bunn say?

The Witness: Mr. Bunn explained to Mr. Fosvett and the [313] other officers of the bank what happened.

The Court: What did he tell them?

Q. (By Mr. Bunn): You have to say what you heard me say.

The Court: What words did he use?

The Witness: Mr. Bunn told that the barbed wire, it was very bad barbed wire, it was all very rusty, and in particular the bank paying against a bill of freight instead of a bill of lading. And Mr. Fosvett answered that he know nothing about it because he was not in charge of the foreign department and promised to Mr. Bunn to call Mr. Schroeder in Oregon—Mr. Schroeder was on vaca-

(Testimony of J. B. Londono.)

tion—and I can't remember the words, the discussion, that happened that day. But in fact, in essence, that was the conversation.

Q. (By Mr. Bunn): Then did you confer with other officers of the bank?

A. Yes, and the fact that I signed a loan from the bank.

Q. That you had what?

A. I had a loan from the bank and I shipped the wire to South America and I had not money to pay to the bank and I asked the permission to ship the wire.

Q. From whom did you ask that, whose permission did you ask? [314]

A. The bank's permission, Mr. Fosvett and the president of the bank—I don't know the name—and Mr. Emshoff who was present too.

Q. Who else was present, if you remember?

A. Mr. Bunn, Mr. O'Neil, the lawyer of the bank.

Q. All right. On that occasion then you asked their permission to do what?

A. To release to ship the wire to South America with the payment of \$27 per ton for the wire. There on the first shipment I made to South America I paid to the bank \$27 per ton.

Mr. Diether: Was this in the conversation, or what?

The Witness: In the conversation we agreed to pay the bank \$27 per ton on the wire I was shipping.

Q. (By Mr. Bunn): Did the bank give you the

(Testimony of J. B. Londono.)

permission you asked to ship the wire to South America? A. Yes.

Q. Did they give it to you on that same day?

A. Yes, but the next time I know as a fact that you obtained from the bank——

Mr. Diether: Just a moment. I object to that as calling for a conclusion of the witness, what he obtained.

The Court: Yes. [315]

Q. (By Mr. Bunn): You got the bank's permission, you say?

A. Yes, to ship the wire with the payment of \$27 per ton.

Q. Then did you thereafter pay \$27 per ton?

A. (Through interpreter): I made the payment of \$27 for the first shipment. That was made at \$27 per ton. But the next shipment the bank permit me——

Mr. Diether: Just a moment. I object to the witness volunteering.

Q. (By Mr. Bunn): Did you pay \$27 per ton release amount on the second shipment?

A. No.

Q. Why not?

A. Because the bank permitted me to ship the wire without payment.

Mr. Diether: May that go out as a conclusion of the witness?

The Court: Yes, that is a conclusion. I think we had better go back into the bank and visit around a while and find out who he talked to.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): Who handled the shipping documents on which the shipments to South America were made? [316] A. Mattoon & Company.

Q. Did Mattoon & Company make the second shipment? A. Yes.

Q. And you did not make a payment to the bank on the second shipment? A. No.

Q. Did Mattoon & Company handle the later shipments of the wire to South America?

A. Yes.

Q. Did you make payments to the bank of \$27 per ton or any amount on those later shipments?

A. No.

Q. Now in this conference in which you said that in your presence—— A. Mr. Bunn?

Q. Yes.

A. I received the documents from the bank on the second and third shipments.

Q. What do you mean, you received the documents?

A. Mattoon & Company made the shipment and delivered the documents to the bank and the bank delivered me the documents without payment. I don't take the document from Mattoon & Company and send it to Colombia, I take it from the bank, the bank delivered me the documents without payment.

The Court: Did you talk to anybody there at that time? [317]

The Witness: Yes.

(Testimony of J. B. Londono.)

The Court: When you got the documents?

The Witness: Yes.

The Court: Who did you talk to?

The Witness: Mr. Powers delivered me the documents.

The Court: Did you say anything, or did he say anything about shipping it?

The Witness: No.

The Court: Did you say anything about not paying \$27 per ton?

The Witness: No, Mr. Bunn said that he obtained from the bank permission.

The Court: Mr. Bunn advised you that he obtained the permission?

The Witness: Yes.

The Court: Very well.

Q. (By Mr. Bunn): Now in that conference with the several officers of the bank in which the president of the bank was there, you had said——

Mr. Diether: What day is this?

Q. (By Mr. Bunn): Did you state the date?

The Court: It was about August 24 or 25.

The Witness: About August 24. The first conference was [318] on the 24th. It was Saturday, I remember.

Q. (By Mr. Bunn): You said a while ago that the bank was told by me in your presence that the bank had paid on a freight bill.

The Court: And not a bill of lading. He has testified to that.

Mr. Bunn: Yes, sir.

(Testimony of J. B. Londono.)

Q. Now did any one of those officers in the bank then and there reply to that particular statement?

Mr. Diether: Made by you?

Mr. Bunn: Yes, in his presence.

The Witness: No, Mr. Fosvett told you that he will call Mr. Schroeder because Mr. Schroeder was on vacation and they know nothing about it.

The Court: Did you later see Mr. Schroeder that day?

The Witness: No, Mr. Schroeder was on vacation.

The Court: I mean Mr. Fosvett. In other words, did Fosvett call Schroeder and you talk to him after that?

The Witness: No, not that I remember, your Honor.

Q. (By Mr. Bunn): You mean you didn't talk to him again or that he didn't call?

Mr. Diether: He didn't talk to him again.

The Court: He said he did not remember. [319]

Q. (By Mr. Bunn): Now that is August 24th, you say? A. Yes, sir.

Q. Now did you make any further inquiry—just answer yes or no—about the delivery of a bill of lading?

Mr. Diether: I object to that as indefinite and uncertain.

Mr. Bunn: I want him to answer yes or no, and then we will see.

Mr. Diether: Inquired from whom?

Mr. Dasteel: By whom?

(Testimony of J. B. Londono.)

Mr. Bunn: I think an effort on his part to find out would be competent and material regardless.

The Court: The objection is overruled. Read the question.

(The question referred to was read by the reporter as follows: "Q. Now did you make any further inquiry—just answer yes or no—about the delivery of a bill of lading?"')

Mr. Diether: The point I wish to observe is delivered to whom, delivered to the bank, delivered to Matson Company, delivered to Mattoon or whom?

Mr. Bunn: To anybody.

Mr. Diether: It is indefinite and uncertain in that [320] particular.

The Court: Overruled.

Do you understand the question?

The Witness: Yes.

No.

Q. (By Mr. Bunn): Did you talk to Mr. Moran? A. No.

Q. About whether he received the bill of lading?

A. Oh, that was on the 10th.

Q. On the 10th of what?

A. I saw Mr. Moran on the 10th.

Q. The 10th of August?

A. Yes. The first time I saw Mr. Moran was the 10th of August. And I saw Mr. Moran on the 24th, that morning.

Q. Well, now, on the 10th, was there any conver-

(Testimony of J. B. Londono.)

sation between you and Mr. Moran about a bill of lading? A. No, not any conversation.

Q. All right.

A. The only conversation I had with Mr. Moran about the documents, it was the 24th, in the morning, when I show him the freight bill, bill of freight, and asked him if he paid the credit, the draft, to Dulien against that document.

Q. Was anybody with you then besides Mr. Moran?

A. Mr. Bunn, Mr. Thomas Bunn. [321]

Q. Now tell us what conversation took place.

A. Mr. Moran told me after he saw the paper that he paid against other document, a larger piece of paper. He used that word.

Mr. Hubert Morrow: The witness is using his hands to show a piece of paper how large?

The Witness: Yes. (Indicating.) He used the words and expression, "larger piece of paper."

Mr. Diether: It was larger than the bill of freight?

The Witness: Yes.

Mr. Hubert Morrow: Indicating about 15 inches in length, I take it.

The Court: I do not know. It did not look to me like it was 15 inches.

Mr. Hubert Morrow: Or 20. He said a larger piece of paper.

The Court: He said a larger piece of paper than the freight bill.

(Testimony of J. B. Londono.)

The Witness: Yes, your Honor. [322]

* * *

Q. Now when did you next thereafter see Mr. Moran? Do you remember seeing him again?

A. Yes, I remember, and I have my recollection in my record, the date. It was about the 29th of August.

Q. Where was it?

A. At the corner of Spring Street and Fourth Street.

Q. What time of day or night was it?

A. It was in the afternoon, I saw him, and I say to him——

Q. Was there anybody else present in the range of hearing?

A. No. But I had many troubles because of the bad quality of the wire, that I cannot sleep.

Mr. Dasteel: If your Honor please, I move that that be stricken.

The Witness: And he say——

Mr. Dasteel: Did he say he said that?

The Court: That is what he said, I say to him I had many troubles on account of the bad quality of the wire and I cannot sleep. That is the witness' words. [323]

The Witness: And he answered me, he also can't sleep because he made a mistake in the bank and everybody in the bank is against him and nobody in the bank wants to take the responsibility of the mistake, of the error.

(Testimony of J. B. Londono.)

Then he told me that the bank now is against me because the bank know that I have a lawyer. The first time I tried to have—he told me—the first time I tried to have the help in the bank, but now the bank is against me because I have a lawyer.

Q. (By Mr. Bunn): Go ahead, if there is anything more in the conversation.

A. In essence, that was all the conversation. It was in Spanish.

* * *

Q. Was there anything said about South America in that conversation?

A. I remember, Mr. Bunn, that Mr. Moran asked me about [324] the condition of jobs, the work, in South America.

Q. On that same occasion?

A. On that same occasion.

The Court: The condition of what?

The Witness: The condition of the work, and I told him——

* * *

A. I answered him that in South America there is very good opportunity for people like him that speak English and Spanish, and that is true.

Q. That you say was on what date?

A. About the 29th of August.

Q. Now when did you next have any contact—no, did you make any other inquiry thereafter about the delivery or not of a bill of lading to the bank?

A. No.

Q. Did you go to Dulien's office?

(Testimony of J. B. Londono.)

A. No. At that time?

Q. Well, later. Did you later go to Dulien's office? [325]

* * *

The Witness: I never inquired from anybody the delivery of the bill of lading. I was trying to locate the bill of [326] lading.

The Court: Did you go to Dulien's office?

The Witness: Yes, I went to Dulien's office the fourth day of September.

Q. (By Mr. Bunn): Now before the 4th of September, did you go anywhere else looking for a bill of lading?

A. About that day I was at Wilmington—

Mr. Diether: What day?

The Witness: About the 4th of September.

The Court: You were where?

The Witness: Wilmington. During that day between the 20th of August and the 4th of September I was trying to locate the bill of lading.

Q. (By Mr. Bunn): Where did you go?

A. I went to Matson Navigation office in Wilmington, with Mr. Sweeney of Mattoon & Company, trying to locate the original bill of lading.

Q. Do you know with whom you talked there?

A. I do not know the name of the man I talked with. I talked to somebody there and asked him about the documents regarding this shipment, and after he tried to find it, he told me that they have not the original bill of lading, and suggested to me that maybe the cashier put it away when the [327]

(Testimony of J. B. Londono.)

freight was paid. But I could not see the cashier that was in the office.

But he show to Mr. Sweeney and I another document regarding this transaction and I looked at the body of the document, supposed to be a carbon copy of the bill of lading, and no exception is made on the body of the document I saw there.

Q. Did you make any comment on that?

Mr. Diether: To whom?

Mr. Bunn: To the man that showed it to him.

The Witness: I asked him why on this shipment, rusty wire, Matson issued a bill of lading, clean bill of lading, or clean document, and he say that maybe the shipper in Honolulu made a bond, a warranty, in order to protect Matson.

Mr. Bunn: Made bond to guarantee, did he say?

The Interpreter: Warranty.

Mr. Diether: Made bond or warranty?

The Interpreter: That perhaps that agents for Matson in Honolulu have made a bond in guaranty, or warranty.

The Court: To Matson?

The Interpreter: To Matson.

Mr. John Morrow: If the Court please, we object to the question and answer, at least the answer as the witness has stated it. There is no foundation shown that this man he was talking to was connected with Matson or sufficiently connected with Matsor to be acting within the scope of his authority [328] in any such statement he might have made. I move to strike the answer.

(Testimony of J. B. Londono.)

The Court: I think you failed to object to the foundation, or to the lack of foundation when counsel was asking him whom he talked to. The evidence shows that it was at Matson. It appeared to be somebody that Matson held out as some person to do business with. The motion to strike is denied.

* * *

Q. (By Mr. Bunn): Now when did you next see Mr. Grinstein? [329]

* * *

(The question referred to was read by the reporter as follows: "Q. Now, when did you next see Mr. Grinstein?")

The Witness: The next time I saw Mr. Grinstein it was at Dulien's office the 4th of September, accompanied with Mr. Bunn.

Q. (By Mr. Bunn): Morning or afternoon?

A. The morning.

Q. Tell us the conversation that took place.

A. Mr. Bunn told Mr. Grinstein that I refused the wire because it is very rusty, very bad wire, and I am not going to take the wire.

Mr. Grinstein say, "Mr. Londono, you have the wire and we have the money."

Then Mr. Bunn explained all the facts about the different kind of wire, galvanized, black wire, rusty wire, unusable wire, and put the fact that the bank pay the credit against bill of freight instead of a bill of lading.

(Testimony of J. B. Londono.)

Mr. Grinstein called Mr. Stanley at his office——

* * *

Q. Will you proceed with the conversation in Dulien's office?

A. Mr. Stanley take part in the conversation between you and Mr. Grinstein in my presence and told Mr. Stanley——

Q. Who told Mr. Stanley?

A. Mr. Grinstein told Mr. Stanley that you say, in other words, that the bank pay the draft against bill of freight instead of bill of lading, and Mr. Stanley admitted, [332] saying that they left the bill of lading at Matson's office and presented to the bank——

Q. Where?

A. At Matson's office and presented to the bank the bill of freight instead of the bill of lading.

Q. Did he say which Matson office?

A. He mentioned Wilmington.

Mr. Diether: Now, if the Court please, I move to strike the answer of the witness upon the ground that it is hearsay testimony and not binding upon the bank. No officer or employee of the bank was present at that time.

The Court: It will be the same ruling as before.

What I have in mind is this: There is a possibility that perhaps there was just as much of a duty on Dulien to present a bill of lading to the bank as there was for the bank to receive it or to ask for it.

(Testimony of J. B. Londono.)

Mr. Diether: I am only asking for a ruling on behalf of the defendant bank.

The Court: I understand that. The motion is denied, subject to a further motion to strike.

Mr. Diether: Do I understand your Honor to indicate that I am to make that motion at the close of this witness' testimony or at any appropriate time during the course of the trial?

The Court: In view of the understanding among all counsel [333] at the beginning of the trial, it would seem to me that the most appropriate time to gather your motions to strike together would be at the conclusion of the plaintiff's case because undoubtedly throughout the trial there will be many things admitted in evidence which, under the understanding we had at the beginning of the trial, one or the other of the parties may wish to strike.

Mr. Diether: And that I take it, your Honor, means——

The Court: And for the further reason that at the conclusion of the plaintiff's case it will be the plaintiff's case and I will have everything to take into consideration then which might either make it admissible or not admissible.

Mr. Diether: And we understand our arrangements, as I understand it, that our motions to strike may apply to any or all of the testimony which might be presented by the plaintiff that we feel is not applicable or admissible as to our particular client.

The Court: I do not want to say anything more

(Testimony of J. B. Londono.)

about the understanding that was had at the beginning of the evidence because it is clear. It ought to be in the record, and it is in the record. If I say anything more now we will then all be confused. Now, we have only one incident to remember. If I say anything about it then we will have two.

* * *

Mr. Bunn: Mr. Morrow has just asked for a repeating by the reporter of Mr. Londono's last answer, I believe.

The Court: I would appreciate that. I thought the witness said that Stanley said he left the bill of lading at Matson's office.

The Witness: Yes.

The Court: Proceed.

Q. (By Mr. Bunn): Go ahead.

A. Then Mr. Grinstein admonished Mr. Stanley because he was talking that way and say that that matter must be handled by his lawyer and stopped Mr. Stanley's conversation.

Mr. Dasteel: If your Honor please, I move to strike the phrase "admonished." I think the witness should limit himself to exactly what was said.

The Court: The word "admonished" will be stricken. Otherwise the answer will stand.

Q. (By Mr. Bunn): Mr. Londono, you said, I believe, that Mr. Stanley said they had left the bill of lading at Matson's office. Did he say who "they" were?

A. He used the word, his men.

(Testimony of J. B. Londono.)

The Interpreter: He said that he used Dulien's men. [335]

* * *

Q. (By Mr. Bunn): Now is that all of the conversation as you remember it on that occasion?

A. That is all I remember, Mr. Bunn.

Q. Mr. Londono, have you ever received an original bill of lading on the barbed wire which you purchased from Dulien? A. No.

Q. Have you ever seen a bill of lading, an original bill of lading, on that purchase?

A. I saw the bill of lading last week in your office shown by Mr.——

The Court: For the first time?

The Witness: For the first time. I do not know his name.

Q. (By Mr. Bunn): Mr. Morrow?

A. Yes, and the other lawyer.

Q. From San Francisco, Mr. Aldwell?

A. Yes.

Q. In other words, for the first time you saw it in my office when it was shown by them?

A. Yes, sir. [336]

Q. Did you yourself ever have any conversation with Mr. Banning of Matson Navigation Company about the wire, you yourself, not your lawyer?

A. At the time I was at Matson delivering a letter for you——

* * *

Q. You answer yes or no first and then I shall pursue the matter. A. Yes.

Q. When was it? A. It was——

(Testimony of J. B. Londono.)

Q. Well, where was it?

A. It was at Matson's office in Los Angeles, main office.

Q. What was the occasion of your being there?

A. I was delivering Mr. Banning a letter from Mr. Thomas Bunn.

Q. A letter from me to Mr. Banning?

A. Yes.

Q. And you then had a conversation with Mr. Banning? A. Yes. [337]

Q. Do you know what, approximately what date that was?

A. It was about the 10th of September.

Q. Was anybody else present in the range of hearing? A. No, not that I can remember.

Q. What was said in that conversation between you and Mr. Banning?

A. I told Mr. Banning that I was in very bad condition, I was losing a lot of money because of the transaction of the wire, and in particular because I had not the right to select the wire and because Matson gave to Gonzalez & Blanco the right to select the wire of all piles, and Mr. Banning apologized, excused, saying he was the——(speaking Spanish).

The Interpreter: He took upon himself to order.

The Witness: Yes, about that matter. In other words, Gonzalez & Blanco have the right to select the wire. But he added to me that he was acting for superior officer from War Assets Administration.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): You say War Assets?

A. War Assets Administration.

Q. Go ahead, if there was anything more.

A. He was very sorry because of that.

Q. Is that all? A. Yes, that is all.

Q. Did you yourself, not your lawyer, have any personal [338] conversation with anybody?

Mr. Laven: Mr. Bunn, I don't believe you set the date of that.

The Court: About September 10th.

Q. (By Mr. Bunn): Did you yourself personally have any conversation with anybody from the War Assets Administration or the War Shipping Administration? Just answer yes or no.

A. Yes.

May I correct something, your Honor?

The Court: He says he wants to correct an answer.

The Witness: When I said before War Assets Administration I mean War Shipping Administration.

The Court: Did you hear his answer? (Assent.)

Q. (By Mr. Bunn): Now answer my question. Did you have personal conversation with anybody from the office of the War Shipping Administration? A. Yes.

Q. Where? A. In San Francisco.

Q. Approximately when?

A. September, 1946.

Q. You do not know the date?

(Testimony of J. B. Londono.)

A. I can't remember the date. [339]

The Court: Was it after your conversation with Mr. Banning?

The Witness: Yes, your Honor.

Q. (By Mr. Bunn): With whom did you talk?

A. I told Mr. Ball, the lawyer for War Shipping Administration in San Francisco——

Q. B-a-l-l? A. B-a-l-l.

Mr. Bunn: That is right, is it not, Mr. Morrow?

Mr. John Morrow: I believe so.

Q. (By Mr. Bunn): What was the occasion of that conversation? How did you happen to do that?

A. I report to my lawyer that I had planned to go to San Francisco and my lawyer asked me to see Mr. Ball and inquire about the order to permit Gonzalez & Blanco to segregate, to take the best wire, in this transaction.

Q. Was this in Mr. Ball's office in San Francisco?

A. Yes, Mr. Ball's office in San Francisco.

Q. Was there anybody else present?

A. Yes, another person was present. I don't know, one or two.

Q. In the range of hearing of the conversation?

The Court: Did they participate in the conversation, [340] or were they just stenographers?

The Witness: I can't say that.

Q. (By Mr. Bunn): You say you cannot say that?

A. Somebody introduced me to Mr. Ball, but I

(Testimony of J. B. Londono.)

don't know if he take place in the conversation or not.

Q. You had a conversation with Mr. Ball?

A. Yes.

Q. What was said in that conversation by you and by him? What did you say to Mr. Ball about the wire?

A. I told him that I was the buyer of the barbed wire, one part of the barbed wire, shipped it by White Squall, and I reported to him that I am losing money because the wire it was very bad wire, very rusty wire, and because he ordered to Matson in Los Angeles to permit Gonzalez & Blanco to take the best wire from all piles of wire. [341]

* * *

Q. (By Mr. Bunn): You may answer. Go ahead and tell what Mr. Ball said.

The Court: Where was this, in the office of the War Shipping Administration?

The Witness: Yes, your Honor.

The Court: Did it have a sign on the door?

The Witness: A sign on the door?

The Court: War Shipping Administration?

The Witness: (Pause.)

The Court: How did you know you were in the War Shipping Administration instead of the Em-porium?

The Witness: Yes, I knew. I saw it on the door.

The Court: Very well.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): What did Mr. Ball say to you?

A. Mr. Ball said that in fact he authorized, he ordered Matson in Los Angeles to permit Gonzalez & Blanco to select the wire because he was advised that Gonzalez & Blanco has an order bill of lading and the other consignee had not.

Q. Anything else that he said?

A. No, not in essence.

Q. You didn't get him to change his order, did you?

A. No. [342]

* * *

Q. Mr. Londono, did anybody of the Citizens Bank bring to you any person, as a prospect, for the purchase of any of this wire?

Mr. Diether: That is objected to as incompetent, irrelevant and immaterial. It has no bearing on any of the issues involved in this case whether they did or did not.

Mr. Bunn: I think it is definitely material whether the bank tried to help him dispose of this wire.

The Court: I do not think so. I think that he was under an obligation, under the circumstances—perhaps the bank was too—to mitigate the damages all around. The objection is overruled. [343]

* * *

The Court: You see, if I should sustain the objection which you have just made you would be holding that he did this for his own benefit, and that is

(Testimony of J. B. Londono.)

one of the issues in the case, whether or not he did it for his own benefit or for the benefit of everybody in mitigation of damages.

The objection is overruled. You can mark that down as something to make a motion to strike on, but presently it is overruled. [344]

* * *

The Court: The objection to the question is overruled. Read the question again, Mr. Reporter.

(The question referred to was read by the reporter as follows: "Q. Mr. Londono, did anybody of the Citizens Bank bring to you any person, as a prospect, for the purchase of any of this wire?")

The Witness: No.

The Court: So far as you know?

Mr. Diether: He already answered. He said no. [345]

The Witness: So far as I know.

The Court: I take it that it should be limited within his knowledge. Maybe somebody came to see him and the Citizens Bank sent him and he did not know about it.

Q. (By Mr. Bunn): Do you understand the question as the court has expanded it?

The Court: He said no, so far as he knows.

Q. (By Mr. Bunn): Did Dulien, so far as you know, send any person or bring any person, I should say, to you as a prospect for the purchase of

(Testimony of J. B. Londono.)

any of this wire after you told Mr. Grinstein that you wouldn't take it?

A. Mr. Grinstein in one occasion asked me permission or authorization and a quotation, a price, and I accepted.

Q. What do you mean by "accepted"?

A. I accepted. I say to him to go ahead and try to sell the wire.

Q. Did he send anybody to you, any person?

The Court: That you know of.

Q. (By Mr. Bunn): That you know of?

A. No.

Q. Did Matson send anybody to you, so far as you know, as a prospect for the purchase of any of this wire? [346]

A. No.

* * *

Mr. Bunn: I have in hand document No. 34, the original letter of September 10, written and signed by me as attorney for J. B. Londono, written to Dulien, Matson and the bank.

Mr. Diether: What number is that?

Mr. Bunn: That is No. 34.

Q. Mr. Londono, I show you that document, No. 34 for identification, and ask you if it bears your signature.

A. Yes, it is.

The Court: That document was received by you from one of the other counsel today?

Mr. Bunn: No. If your Honor please, that is the original document which bears the signatures of all parties.

The Court. Of various people. In other words,

(Testimony of J. B. Londono.)

that has been in your possession or his possession all the time?

Mr. Bunn: In my possession.

The Court: Very well.

Mr. Bunn: And I ask counsel for a stipulation that this original letter bears the words "approved and agreed to" in the lower left-hand corner, followed by the signature of Dulien Steel Products, Inc., by E. S. Grinstein, of United States Maritime Commission, Matson Navigation Company, [347] Berth Agents, by J. B. Banning, Jr., of the Citizens National Trust & Savings Bank by H. D. Ivey, President, and J. B. Londono, and that it bears my signature as the writer thereof, under which signature of mine are the words, "Attorney for J. B. Londono."

I ask that it be stipulated that that is the original document and that those signatures are genuine.

Mr. Diether: Will you also stipulate that the signature of the bank of Mr. H. D. Ivey was put on that document on September 18, 1946?

Mr. Bunn: If you tell me, sir, that that was the date it was put on, I shall so stipulate. I myself of course have no personal knowledge of the date the bank signed it as distinguished from the affixing by the other parties of their signatures.

Mr. Diether: That is my information, and I will so stipulate.

Mr. Bunn: On your statement to that effect, I will so stipulate with you.

Mr. Diether: Thank you.

(Testimony of J. B. Londono.)

The Court: It is so stipulated?

Mr. Hubert Morrow: So stipulated?

Mr. Laven: So stipulated.

Mr. Dasteel: So stipulated.

The Court: Very well. [348]

Mr. Bunn: We offer that as Plaintiff's Exhibit No. 34.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit No. 34 and received in evidence.)

The Court: Is this the letter you took over to Mr. Banning that day?

The Witness: Yes.

* * *

The Court: Excuse me a moment, counsel. Did the stipulation include the fact that this letter was written on or about September 10? [349]

Mr. Hubert Morrow: Ours did.

Mr. Laven: The government's did.

Mr. Diether: Yes.

The Court: Because it says that it will confirm the understanding reached yesterday.

Very well.

Q. (By Mr. Bunn): Now, Mr. Londono, calling your attention to the language which the court has just read in that letter, the first two lines of the letter which say, "This letter will confirm the understanding reached yesterday," do you remember being present in any conference in the office of your at-

(Testimony of J. B. Londono.)

torney, Thomas Bunn, in which there were present any persons from the group of your opponents in this lawsuit?

A. Yes, I remember the conference that we had in your office.

Q. Where?

A. The 9th of September, in your office.

Q. In my office? A. Yes.

Q. Do you remember who was there?

A. I remember that Mr. Grinstein was there, Mr. Banning was there, Mr. O'Neil, the lawyer for the Citizens Bank, was there, you were there, Mr. Arturo Rendon, and I don't remember if Mr. Dasteel was there or not. Can you help me? [350]

* * *

Mr. Bunn: The witness has stated he doesn't remember whether Mr. Dasteel was present.

Mr. Dasteel: I join with him. I don't remember either. [351]

Q. (By Mr. Bunn): Now before you signed the sale order at Dulien's office on July 12—withdraw that.

Before you went to Dulien's office on July 11th, had you made every effort in the state of California to buy barbed wire? You said you planned to go to New Orleans. Had you made effort in the state of California elsewhere to buy barbed wire?

Mr. Diether: I object to that.

Mr. Dasteel: Your Honor please, I object to that on the ground that those dates were prior to any negotiations or transactions between the plaintiff

(Testimony of J. B. Londono.)

and the defendant Dulien. We hadn't heard of him and he hadn't heard of us until July 11th, so anything he did prior to that time would be incompetent, irrelevant and immaterial.

The Court: I take it that counsel is now moving on to the phase of establishing his measure of damage. That would be the only materiality of this and the only ground upon which it could possibly be admissible.

Mr. Bunn: We have alleged non-availability, generally speaking, of barbed wire.

The Court: The objection will be overruled and the evidence will be admitted for that sole purpose.

* * *

Mr. Diether: Your Honor please, I would like to add a further objection to the one that Mr. Dasteel made. I think that the question of whether or not wire was available would depend upon another date, not prior to July 11, but perhaps the date on which he took delivery, which would be on July 30 or July 31st. What happened prior to July 11th would be absolutely immaterial even on the question of damages.

The Court: I think on a matter such as that, that is, measure of damages which depends upon the availability of a commodity such as barbed wire, you cannot fix any particular moment or period of time, and this is not too remote in period of time from the date which you are claiming to prevent its admissibility.

(Testimony of J. B. Londono.)

In other words, it is not precisely what the condition was at 12:00 o'clock noon on July 31, but what the general condition was during the period of this transaction.

The objection is overruled. [353]

* * *

(The question referred to was reread by the reporter as follows: "Q. Before you went to Dulien's office on July 11th, had you made every effort in the state of California to buy barbed wire? You said you planned to go to New Orleans. Had you made effort in the state of California elsewhere to buy barbed wire?"')

The Witness: Yes, from May 6th until July 11. In other words, I come to California to buy barbed wire.

Q. (By Mr. Bunn): And you tried to find some?

A. Yes, from May 6 until July 11 I was looking and looking for barbed wire.

Q. Did you find any besides this coming from Honolulu on the White Squall?

A. Not in fact. [354]

Q. Did you look for barbed wire elsewhere in California after the 29th of July, 1946?

A. Yes, I was looking for good wire. [355]

* * *

Q. (By Mr. Bunn): Mr. Londono, did you at any time in 1946, or since that time, maintain any business establishment in Los Angeles?

A. No.

(Testimony of J. B. Londono.)

Q. When you were here in the last six months of 1946, where did you receive your mail?

A. At the Hotel Clark, at the Colombian Consulate, at Mr. Arturo Rendon's office.

Q. Now, you remained here how long in 1946, after the 29th of July?

A. Until November, 1946.

Q. Within that time you left the city, did you, on any occasion?

A. I was in San Francisco. [361]

Q. Is that the only trip out of the county that you made?

A. I was in New York in November for two days, and I was in Long Beach a hundred times.

* * *

Q. Now, why did you remain in Southern California until November?

A. Because of this, because of the bad quality of the wire, because I was trying to sell the wire to mitigate the loss that I had on the wire.

Q. Where did you live while you were here?

A. At the Hotel Clark.

Q. At all times from July?

A. At all times from July until November, yes with the exception of the days I was in San Francisco and New York.

Q. Did you keep any actual record of your expenditures for your personal living expenses?

Mr. Diether: If the Court please, I observe that counsel is now trying to prove an item of special damages, for the living expenses of Mr. Londono

(Testimony of J. B. Londono.)

in California during the period of time that this wire was being disposed of. We wish to object to that line of testimony on the ground it is [362] incompetent, irrelevant and immaterial, and has no bearing on any of the causes of action against the bank; that the liability of Mr. Londono for living expenses was never within the contemplation of the parties, and, certainly, his expenses were not proximately caused by any act of the bank as alleged in the complaint.

The Court: Special damages are never in contemplation of the parties. That is what makes them special.

Mr. Diether: Well, we don't feel that we would be liable under any circumstances for these special damages because they were not proximately caused by any act of the bank which is alleged in the complaint, and we, therefore, move to strike his testimony thus far with respect to that subject, and object to any further testimony on that subject being applicable to the defendant bank.

The Court: Objection overruled. Motion denied.

Mr. Diether: May it be understood that this testimony is all subject to the same objection?

The Court: Without prejudice to a motion to strike.

Mr. John Morrow: On behalf of Matson, we join in the objection of Mr. Diether and in his motion to strike.

Mr. Laven: The government joins in the same objection.

(Testimony of J. B. Londono.)

Mr. Dasteel: And so does Dulien. It was my understanding, your Honor, that the objection of one would be deemed to be the objection of all defendants? [363]

The Court: No. You recall that you suggested that, and your stipulation was denied.

Mr. Dasteel: In that case I will have to object more frequently.

The Court: The objections are overruled.

Mr. Bunn: Miss Reporter, will you read him the question, please?

(The question was read by the reporter.)

The Witness: No.

Q. (By Mr. Bunn): Do you remember what you paid for your room at the Clark Hotel?

A. Yes.

Q. How much?

A. \$3.50 per day.

Q. How much? A. Three-fifty.

Q. Can you give us an approximation of the cost of your own meals—not your friends' or your guests'?

Mr. Diether: We object to that as too indefinite and uncertain.

Mr. Dasteel: I join in the objection.

Q. (By Mr. Bunn): You ate while you were here, didn't you? A. Yes.

Mr. Diether: That is objected to, also. [364]

Mr. Dasteel: We also object.

Mr. John Morrow: And Matson joins in the objection.

(Testimony of J. B. Londono.)

Mr. Hubert Morrow: May we have a stipulation as to this entire line?

The Court: Yes. It may be deemed that the original objections will cover the entire line.

Now, what is your question? "You ate while you were here, did you?" or "How much did your meals cost?"

Q. (By Mr. Bunn): Can you give us an approximation of what your meals cost you?

A. About \$7.00 per day.

Q. Can you give us an approximation of what your incidental expenses were, that is, the items of living expenses other than basic room rent and cost of meals?

Mr. Diether: Your Honor, I think that goes a little beyond——

The Court: That is pretty indefinite.

Mr. Diether: That is my point, your Honor.

The Court: Of course, I don't know what basic living expenses are. We start out with \$10.00 in the morning, and by night you haven't got it, and you can't tell where you spent it. I guess that is incidental.

Mr. Dasteel: Your Honor, I think if counsel would interrogate the plaintiff about what were his expenses, instead of counsel leading him on each item—— [365]

Mr. Bunn: All right.

Q. (By Mr. Bunn): What other items of living expenses did you have besides food and room rent?

A. Telegrams, stamps to write letters to my family. I wrote 182 letters in six months.

(Testimony of J. B. Londono.)

The Court: You wrote two letters?

The Witness: 182.

The Court: 182 letters?

The Witness: To my wife. And laundry, and press, and transportation, and many other things. I can't have records.

Q. (By Mr. Bunn): Do you know how much money you spent?

Mr. Diether: That is objected to as too indefinite and uncertain.

The Court: Yes, that is indefinite.

Q. (By Mr. Bunn): Can you give us an approximation——

A. I calculate——

Q. ——of what those incidentals were?

A. I think I can say that. I calculate all my expenses in that three months more or less as about \$3,000. I have no records how much I pay for food, for telegrams, for letters, for transportation. It was calculated by me, \$3,000.

Mr. Diether: I move that the answer be stricken as a conclusion of the witness and not based on any itemization of the expenses he has had.

The Court: Motion denied. That is your necessary [366] expenses? That doesn't mean going to Ciro's or——

The Witness: No, necessary expenses.

Q. (By Mr. Bunn): Mr. Londono, did you at any time by word of mouth, as distinguished from by writing, instruct the bank to deliver the bill of lading to Mattoon & Company?

(Testimony of J. B. Londono.)

A. No, not that I remember.

Q. Was there any reason why, from August the 7th, which you gave as the date of a visit—no, which is the date of a letter from Dulien to you, until September the 9th, which Mr. Dasteel said was Admission Day—why did that long a time elapse between any personal conference between you and Mr. Grinstein?

Mr. Diether: That is objected to as calling for a conclusion.

Mr. Dasteel: I join in the objection.

Mr. Bunn: It may not call for a conclusion at all. It may well be a fact.

The Court: Your question is, “Why?” That calls for a reasoning process.

Mr. Bunn: All right.

The Court: A reasoning process involves a conclusion. Therefore, it is a conclusion of the witness.

Mr. Bunn: I will withdraw it or I will submit to the adverse ruling, which is the same thing.

Q. (By Mr. Bunn): Do you know whether or not Mr. [367] Grinstein was in Los Angeles County between the 7th of August and the last part or the first week of September?

Mr. Dasteel: We object on the ground that calls for a conclusion of the witness. He might have been here for five minutes during that period.

Mr. Diether: It is also immaterial, and has no bearing on any issues involved in the case.

The Court: Overruled.

The Witness: At the times I wanted to see Mr.

(Testimony of J. B. Londono.)

Grinstein, between August the 7th and September the 4th, I was told that Mr. Grinstein was out of the city; in Honolulu at one time, I remember. In other words, I could not see Mr. Grinstein during that time, and I tried to see him.

Q. (By Mr. Bunn): Did you go to his office?

A. I don't remember.

Q. Did you telephone his office?

A. Yes, by phone. I am sure by phone.

Q. Did you talk to Mr. Stanley within that period of time yourself? A. Not in person.

The Court: On the phone?

The Witness: On the phone, yes. I was informed by Mr. Stanley that Mr. Grinstein was out.

Q. (By Mr. Bunn): On what day did you first, after August 7th, see Mr. Grinstein? [368]

A. September the 4th.

Q. Now, you said you went to the Moore-McCormack dock on July 31st and saw some wire identified for you. Did you give specific instructions for the shipment of that wire on the 31st?

A. Yes. I instructed Mattoon & Company don't ship that wire in that condition. I instructed him to segregate, to separate the best wire from the very rusty wire.

Q. Do you know what was done with that wire?

A. Yes.

Q. What was done with it?

A. Mattoon proceed to segregate. I know that because they send me bill, charging bill, and after

(Testimony of J. B. Londono.)

that I was reported that 112 tons were shipped, and one balance of very, very rusty wire was left on the dock.

Q. At Moore-McCormack?

A. At Moore-McCormack, yes.

Mr. Diether: May I have the last part of the answer read, please?

(The answer was read by the reporter.)

Q. (By Mr. Bunn): Do you know how long that balance of rusty wire you last mentioned remained on the dock at Moore-McCormack? A. Yes.

Q. How long? [369]

A. It was from July the 31st until—1946, until the summer of 1947, about May, 1947.

Q. We call that the spring out here.

A. The spring.

Mr. Dasteel: Your Honor please, I would like to object to counsel, in interrogating the witness, in effect, and the answers, referring to the rusty and rotten wire. There is no evidence yet in this case that the wire was rusty, and it is a matter of degree, but the witness emphatically at all times when he has an opportunity refers to it as bad wire and rusty wire.

The Court: He has testified it was rusty.

Mr. Dasteel: That is just his opinion.

The Court: What is that?

Mr. Dasteel: That is his opinion.

The Court: Objection overruled.

Mr. Dasteel: His statement. There is no proof.

The Court: Objection overruled.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): Did you come back to Los Angeles in 1947? A. Yes, sir.

Q. Did you while here see any of the wire that had come over on the White Squall under your order from Dulien?

Mr. Diether: When was that?

Mr. Bunn: In 1947. [370]

The Witness: Yes.

The Court: When did you come back in 1947?

The Witness: It was between—I arrived in Los Angeles on March the 29th.

The Court: March 29th, 1947?

The Witness: Yes, your Honor. I remember because it was my birthday, and I was previously reported by Mr. Bunn by that——

Mr. Diether: I object to the witness volunteering.

Q. (By Mr. Bunn): What did you do, if anything, in regard to any of the barbed wire——

A. Oh, yes.

Q. ——in the spring of 1947?

A. I went to the Moore-McCormack line, Moore-McCormack dock, to inspect some wire that Mr. Sweeney from Mattoon & Company told me may be from the same lot of wire moving from Long Beach Pier A to Moore-McCormack line on July 31st. We went on to the pier of the Moore-McCormack, and I identified the barbed wire.

Mr. Sweeney of Mattoon reported to me that the dock charge would be about \$700 which amount would be forgiven from Moore-McCormack if we

(Testimony of J. B. Londono.)

proceed to ship wire to any place, then, because the freight would be the same as the dock charges. I accepted to ship this wire to South America. And on the other side—— [371]

The Court: How much was it?

The Witness: It was 477 coils, rolls, of barbed wire; 100-pound coils.

Q. (By Mr. Bunn): And you then made arrangements and did ship it?

A. Yes; and shipment was made by Mattoon & Company to Cartegena, under the name of Londono Hermanos, Limited.

Q. Did you see the attorney for Dulien in the spring of 1947, our friend, Mr. Dasteel, here?

A. Yes.

Q. Where did you see him?

A. It was at some place when Mr. Gonzalez, Mr. Thomas Gonzalez from Gonzalez & Blanco, had some barbed wire supposed to be from the lot that I sold him 1946, and that wire, it was there because Mr. Gonzalez refused to take because that wire will not resist——

The Court: No. The question is, where did you see Mr. Dasteel? At Gonzalez's office?

The Witness: No, I saw on the place we saw the wire. I taken to the place on the occasion I saw Mr. Dasteel.

The Court: Well, where was it? Some warehouse or some place?

The Witness: Yes.

The Court: Gonzalez & Blanco's warehouse?

(Testimony of J. B. Londono.)

The Witness: Gonzalez & Blanco—No, your Honor. [372] One place where Gonzalez & Blanco had the wire to pickle it.

The Court: To pickle?

The Witness: To pickle.

The Court: And that is where you saw Mr. Dasteel?

The Witness: Yes.

The Court: When was that?

The Witness: It was during April, 1947, about April, yes.

Mr. Diether: Did you say it was in February?

The Witness: April.

The Court: April, 1947?

The Witness: At that time, with Mr. Dasteel present, Mr. Gonzalez refused to take this wire at the price of \$51 per ton because don't resist the pickling process, and he proposed——

Q. (By Mr. Bunn): In Mr. Dasteel's presence?

A. ——in Mr. Dasteel's presence to accept this wire at the price of \$4.50 per ton, and we accepted it because the wire, it was so bad, no other buyer.

Q. Did Mr. Dasteel join in that——

A. Yes.

Q. ——approval of \$4.50? A. Yes. [373]

* * *

Mr. Diether: May I inquire of counsel if that is the wire, which the witness is now testifying about, the 104 tons of wire which Mr. Bunn wrote to all the parties concerning?

Mr. Bunn: Yes, I think so.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): Was there any person present at that gathering or assembly at the location of that wire from the Citizens Bank?

A. I don't remember.

Mr. Bunn: Gentlemen, may I ask for a stipulation that 104 tons of it were by agreement of all of you except Matson, and without objection by Matson, sold to Gonzalez & Blanco for \$4.50 per ton?

Mr. Diether: I understand if that was done, it was all done pursuant to the arrangements set forth in the letter of September 10th, which you offered in evidence yesterday, being Exhibit No.—

The Court: Whatever it is.

Mr. Diether: —without prejudice to any of the rights of the parties.

Mr. Bunn: No. 34, I think it is.

The Court: Yes, that is right. No. 34. [374]

* * *

Mr. Dasteel: I don't know why it would be necessary to stipulate to that. We all agreed it was to mitigate the damages, without waiving the rights of the defendants, and that he could proceed. I don't see any necessity for the stipulation.

* * *

Q. (By Mr. Bunn): Mr. Londono, how much wire did you actually receive from the Dulien shipment?

Mr. Diether: I object to that as no proper foundation laid. It doesn't show he has any knowledge from any circumstance that has been related so

(Testimony of J. B. Londono.)

far as to how he could estimate or determine how much wire he received.

Mr. Laven: The government joins in the objection. That is not the best evidence.

Mr. Diether: I add that to the objection.

Mr. Bunn: May he answer the question "Yes" or "No," and then may I develop it? I asked him if he knows.

The Court: No, you said: How much did you receive? [375]

Mr. Bunn: All right.

Q. (By Mr. Bunn): Do you know how much you received? A. Yes, by the records.

Q. How much did you receive?

Mr. Diether: I object to that.

Mr. Laven: I object as not the best evidence.

Mr. John Morrow: The same objection by Matson.

The Court: What do you mean by "records"?

The Witness: Shipping documents, and records of sales to Gonzalez & Blanco.

Mr. Diether: May I have the answer read?

(The answer was read by the reporter.)

Mr. Dasteel: That is not what he received.

Mr. Hubert Morrow: There might be an ambiguity there as to the word "received."

The Court: Yes, that is in my mind.

Q. (By Mr. Bunn): Mr. Londono, how much of the wire that was unloaded from the White Squall did you or your agents make disposition of?

(Testimony of J. B. Londono.)

Mr. Diether: That is objected to.

Mr. Dasteel: That is objected to.

Mr. John Morrow: That calls for a conclusion. He wasn't there all the time, as he has testified.

Mr. Diether: And not the best evidence.

Mr. Laven: It is not how much he disposed of, your Honor. [376] It is how much he actually received. Therefore, it would not be the best evidence.

Mr. Dasteel: Further than that, your Honor, it is my contention that it is how much wire was available for him on the dock that was unloaded from the White Squall, that was there.

The Court: That is your case?

Mr. Dasteel: Yes.

Mr. Laven: That is also the government's case, your Honor.

The Court: That is your case, then. Will you read the question again, please?

(The question was read by the reporter.)

The Court: The witness has not shown by his testimony a sufficient foundation to indicate that he knows how much wire was unloaded from the White Squall. The objection is sustained on that ground only, and overruled as to all the other grounds.

Q. (By Mr. Bunn): Mr. Londono, do you know, of your own knowledge, how much wire, barbed wire, was unloaded from the White Squall at Pier A at Long Beach? A. No.

The Court: How much wire did you ship or sell, one or the other—total?

(Testimony of J. B. Londono.)

Mr. Diether: That is objected to, your Honor. That is [377] not material; only insofar as it relates to the question of mitigation of damages. If he is trying to ascertain the witness'—if counsel is trying to elicit testimony relative to the shortage, if any, that this witness sustained, how much he shipped is not material. It is how much he received from Matson Navigation Company or Matson Navigation Company's agent. Read the question again please.

(The question by the court was read by the reporter.)

The Court: —which had come on the White Squall?

Mr. Dasteel: May I make an inquiry? There is a point involved that is being overlooked. There was so much wire available. We claim 2,000 tons, or 2,300 tons on the dock. There was 2,000 tons that Londono, the plaintiff, was entitled to remove or ship. There were 300 tons that Dulien would be allowed to remove. Now, the question is not how much he removed. He may have shipped 1100 tons or 1200 tons, and may have left a lot on the dock. The question is, how much was available to him, and the shipping documents show there was 2,300 tons all together, of which there was available for this plaintiff 2,000 tons.

The Court: What shipping documents?

Mr. Dasteel: The freight bills, the bills of lading, the invoices, many documents.

(Testimony of J. B. Londono.)

The Court: The objection is overruled.

Mr. Bunn: You may answer. [378]

The Court: Read the question again, please.

(The question referred to was read as follows: "Q. How much wire did you ship or sell, one or the other,—total?")

The Court: —which came on the White Squall?

(The question was interpreted.)

Mr. Diether: Your Honor, may we have a question which he could answer "Yes" or "No"? Then I would like, if your Honor permits him to answer and if he does know how much he shipped, then I would like permission to examine the witness on voir dire as to his knowledge.

The Court: He has testified he knows the total by a question asked by Mr. Bunn, and I don't think we need to go on voir dire at this time. You can cross-examine him when you have the opportunity. Now, do you remember the question?

The Witness: Yes, your Honor.

The Court: All right.

The Witness: 1,919 tons. In other words, it was 2,000 tons less 81 tons.

Q. (By Mr. Bunn): Now, Mr. Londono, did you ship any wire in the last six months of 1946, or the first six months of 1947, other than the wire that came on the White Squall? A. No.

The Court: Did you sell any? [379]

The Witness: No.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): Did you sell any other than that? A. No.

Q. Who handled the actual shipping arrangements for that barbed wire that was shipped?

A. Mattoon & Company.

Q. All of them? A. All.

Q. Now, did you receive any—answer “Yes” or “No”—any bills from Mattoon & Company for expenses in connection with segregation of the wire?

A. Yes.

Q. Did you pay them? A. Yes.

Mr. Dasteel: Your Honor please, I move that that answer be stricken. I object to the question, too, for the reason that no matter what kind of wire the plaintiff received, he probably would have employed somebody to segregate it, the black from the galvanized, and some that was a little weather-beaten, some which had dust on it, and that would not be a proper charge.

The Court: Red dust?

Mr. Dasteel: Red dust, yes, your Honor, which is prevalent in Honolulu, we understand.

The Court: The objection is overruled. That may be a [380] factor to be taken into consideration in the event any judgment is entitled to be given to the plaintiff.

Q. (By Mr. Bunn): Did you pay all the bills you received from Mattoon & Company?

A. Yes.

The Court: Are they in the list here marked for identification?

Mr. Bunn: No, sir; because they are in the sub-

(Testimony of J. B. Londono.)

poenaed records from Mattoon, and they will have to be testified to by Mattoon men. And before that time we will go through them and have a list.

The Court: All right.

Mr. Hubert Morrow: Why couldn't they be introduced subject to objection, and save a lot of time?

Mr. Bunn: I am perfectly willing to put it in now by him, but I assumed you would object, and that he himself wouldn't know as much about it as Mr. Sweeney would.

Mr. Hubert Morrow: I don't say that as a criticism, but simply making the suggestion.

Mr. Bunn: I may say that the incidental expenses for hauling and segregation, and the several items set up on page——

The Court: Do you have the bills for those that he paid?

Mr. Bunn: Not in one bill, no, sir. They are in the [381] subpoenaed files.

The Court: Well, in various files?

Mr. Bunn: I have a summary of them, signed by Mattoon & Company, but they are not the original bill. The original bills Mr. Sweeney himself has to testify to.

The Court: Are they here?

Mr. Bunn: They are supposedly here. They were brought in under subpoena.

Mr. Diether: Your Honor please——

Mr. Bunn: They are in a stack of subpoenaed documents.

Mr. Diether: If your Honor please, these bills are merely Mattoon's bills to Mr. Londono. I have

(Testimony of J. B. Londono.)

seen them. Mr. Londono didn't pay these expenses directly. He got bills from other persons. So Mr. Swéney is in no position to do that.

The Court: Are you going to put counsel to the bother of bringing in Mr. Koppel, or Mr. This-one and Mr. That-one, and, finally, if you go to the ridiculous extreme, you would have to go down and get hold of the man on the dock and say to him, "Did you do the work this day? Did you get paid? How did you get paid? Was it in money? Yes. Was it in United States money? Yes. Are you sure it wasn't counterfeit"?

Mr. Diether: Your Honor, I don't have that line of objection in mind, but from looking at the bills you can't [382] tell where the work was performed, or what particular kind of service was being rendered, other than it was segregation of wire. You don't know whether it was at the Moore-McCormack dock or Pier A, whether it applied to the 300 tons of wire which eventually went to Dulien, or what. You have no knowledge of the circumstances in connection with what these items of expense relate to. Now, if somebody can explain that——

The Court: You mean your position is that this plaintiff here would be obligated to pay the segregation of the wire for Dulien?

Mr. Diether: Absolutely not.

The Court: I see.

Mr. Diether: But it may be included in that is what I say. It may be included in items of expense that are shown in those bills.

(Testimony of J. B. Londono.)

The Court: Is there some contention that Mattoon & Company acted for Dulien also?

Mr. Diether: No. Koppel Brothers were also acting as I understand it, for Gonzalez & Blanco in getting their shipment off the dock. I understood they did some of the segregation work. But I think that before those bills could be introduced in evidence we would need some explanation. Of course, the bank takes the position they are not in any way material, as far as the bank's cause of action is concerned, [383] for the simple reason they are not proximately caused by any acts of the bank. Of course, not in the contemplation of the parties, and all the other objections I have.

Mr. Hubert Morrow: May I make a suggestion to save time? Why couldn't this witness be testifying subject to all objections that he spent a certain amount covering certain bills, total, and then if Mattoon & Company are to be here, they can testify as to the bills, and under the general rule as to documents kept in the ordinary course of business, they might be introduced in evidence.

The Court: I would think so.

Mr. Hubert Morrow: And that is subject to cross-examination.

The Court: Yes. In personal injury cases in the Superior Court time after time they will bring in a garage mechanic who will testify that he did the work and got the money, or they will produce an X-ray bill, and say, "Yes, I paid it. Here is the receipted bill."

(Testimony of J. B. Londono.)

I think if counsel insists on the objections, they are valid objections if there isn't any foundation laid to show that this work was actually done on that barbed wire on such-and-such a particular dock. But this witness certainly can testify as to what he paid.

Mr. Bunn: Your Honor please, I anticipated these objections. That is the reason I merely asked if he paid the bills [384] from Mattoon, and I intended to bring Mr. Sweeney in and have him testify.

The Court: How much did you pay Mattoon? That is subject to all the objections that were made.

Q. (By Mr. Bunn): If you remember the exact amounts? A. It is in the complaint.

Q. Again I ask you, did you pay whatever Mattoon bills you got? A. Yes.

The Court: Now, to refresh your recollection here, how much was it? How much did you allege?

Mr. Bunn: We alleged \$6,540.66, of which, however, one item was incurred which has not been paid yet.

The Court: One item of what?

Mr. Bunn: One item of the specifications in that allegation, the last item on pages 7 and 8, of the complaint.

The Court: That is in paragraph XI?

Mr. Bunn: Yes, sir.

The Court: That would be:

(Testimony of J. B. Londono.)

Dock Storage.....	\$2,837.45
Inspection by Los Angeles Cargo Appraisers	38.85
Segregation and Supervision.....	48.00
Extra drayage on account of poor condition of Wire.....	130.50
Sorting Labor on account of poor condition of Wire.....	2,734.86
Extra charges by Mattoon & Co., Inc.....	750.00
The last one of \$750 has not yet been paid?	

Mr. Bunn: Has not yet been paid.

The Witness: Because I had not a bill for it.

The Court: You had not?

The Witness: I had not a bill from Mattoon.

The Interpreter: It has not been billed by Mattoon & Company as yet.

The Court: As to all of the items I have just read, did you pay them to Mattoon & Company? That is, \$2,837.34, and the inspection by Los Angeles Cargo Appraisers, \$39.85, and all these different items?

The Witness: I paid it to Mattoon.

The Court: You paid them all to Mattoon & Company?

The Witness: Yes.

The Court: And then Mattoon & Company paid the dock storage and the drayage and cartage?

The Witness: Yes, your Honor.

The Court: So that you have paid Mattoon & Company the items that are listed in paragraph XI of the complaint \$6,540.66 less \$750?

(Testimony of J. B. Londono.)

The Witness: Yes, your Honor.

Mr. Bunn: All of which will be testified to in as much [386] detail as counsel require by Mr. Sweeney.

The Court: If you haven't been billed by Mattoon & Company for \$750, how do you know you owe it to them? They told you?

The Witness: Yes, Mr. Sweeney told me it is in his books.

The Court: I see.

Q. (By Mr. Bunn): Now, Mr. Londono, do you remember by what date the entire shipment of barbed wire on the White Squall had been unloaded?

* * *

The Witness (Through interpreter): To my knowledge, it was up to the 9th of August, 1946.

The Court: Does he mean about the 9th of August, as far as he knows?

The Interpreter: Up to the 9th, he says.

The Court: Well, ask him if he means about the 9th?

The Witness: About the 9th, yes, sir.

Q. (By Mr. Bunn): Now, in the meantime, between the 31st of July and the 9th of August, while wire was being [387] unloaded, was any wire also being removed, to your knowledge, from the dock in those nine days? A. Yes.

The Court: He has already testified to that. He said he was down there with Mr. Grinstein and saw them.

(Testimony of J. B. Londono.)

Q. (By Mr. Bunn): All right. On how many days did you yourself see wire being moved direct from the boat to cars rather than from the boat to the floor of the dock?

A. It was several days. I am sure for two days.

Q. Now, after August 9th, and after all the wire had been unloaded, did you see any movements on the dock?

A. Yes.

Q. What did you observe?

A. I observed people from Gonzalez & Blanco selecting wire from all piles—— (through interpreter) taking them away in cars, railroad cars and trucks.

Mr. Dasteel: Your Honor please, I am a little disturbed about making objections, but it seems to me these questions have already been asked and answered yesterday. Mr. Bunn went through the entire thing, and it is repetition.

Mr. Bunn: On each one of these there is something that appears in my notes that requires clarification. That is the reason that I asked.

The Court: I remember he testified yesterday about unloading it on the one occasion. Now, he is asking if there [388] was another one, as I understand this evidence, and he said he saw it on two times.

Mr. Dasteel: But he also asked him, if your Honor please, if that was all he saw and if that was all he knew about them, and the witness answered "Yes."

(Testimony of J. B. Londono.)

The Court: He asked if that was all he saw at the time.

Q. (By Mr. Bunn): Now, Mr. Londono, will you describe the wire, as you saw it, any or all of it, on the dock at Long Beach in the month of August, 1946.

The Court: In what part of the month?

Mr. Bunn: I am speaking of the quality and condition of the wire.

Mr. Diether: He hasn't set any particular time.

Mr. Laven: It is indefinite.

Mr. Bunn: All right. I will change it.

Q. (By Mr. Bunn): Do you remember on what date after August 9th you were at the dock next,—any particular day A. I said all days.

Q. I believe you said you went down there after you talked to me on the 10th? A. Yes.

Q. In the afternoon,—Saturday?

A. Yes, but I was there almost all days after the 31st of July. [389]

Q. You said almost all days?

The Court: Almost every day.

Mr. Bunn: That means every day. All right.

Q. (By Mr. Bunn): Directing your attention to your observation of the wire on Saturday afternoon, August 10, what did you observe about the quality and condition of the wire?

A. I observed all kinds of wire; small quantities of galvanized wire, looked like white; a larger quantities of black wire; and still larger quantities of rusty wire.

(Testimony of J. B. Londono.)

Mr. Diether: Of what?

The Witness: Rusty wire.

The Court: More quantities of rusty wire.

The Witness: That I could not see if it was galvanized or not, because the color it was black or yellow. In other words, I can say that I calculate about 20 per cent galvanized wire, about 20 per cent rusty wire usable, and 60 per cent very rusty wire unusable. That I remember that I was able——

The Court: So that is your estimate of the various lots you saw on the pier from time to time?

The Witness: Yes, your Honor. And I was there several times to broke many pieces of the wire with my hands, because it was so rusty.

Q. (By Mr. Bunn): Can you approximate the percentage of [390] good wire, if any, which you shipped from Los Angeles to South America?

Mr. Diether: That is objected to, your Honor please. This witness has already testified that this shipping was done by Mattoon & Company. He didn't personally actually see any wire except that which was on the dock.

Mr. Bunn: Oh, he didn't say that at all. He said Mattoon & Company handled the shipping. He didn't say he didn't.

Mr. Hubert Morrow: We also want to object to the word "good," as to what counsel means by that.

Mr. Bunn: All right. I will reframe it.

The Court: All right.

(Testimony of J. B. Londono.)

Mr. Hubert Morrow: You have to be very specific on that.

Q. (By Mr. Bunn): Mr. Londono, did you cause to be shipped to South America any wire which was altogether in compliance with the representations——

The Court: Objection sustained. Mr. Londono, do you know how much galvanized wire you shipped?

The Witness: About 20 per cent, your Honor.

The Court: Well, how many tons?

The Witness: 200 tons.

The Court: 200 tons of galvanized wire. And how much [391] other wire did you ship?

The Witness: I shipped 1,000 tons.

The Court: 1,000 tons? That is 1,000 tons?

The Witness: 1,050 tons.

The Court: 1,050 tons? Of black wire?

The Witness: Of black wire.

The Court: What was the condition of the 1,050 tons of black wire when you shipped it?

The Witness: About 75 per cent rusty, and 25 per cent in good condition including the black and galvanized.

The Court: About 25 per cent in good condition, and 75 per cent rusty?

The Witness: Rusty.

The Court: Of the 75 per cent rusty, was all of it usable, or was it badly rusted?

The Witness: I can't say, your Honor, because

(Testimony of J. B. Londono.)

I don't know whether it was used in Colombia or not.

Mr. Diether: I move to strike the last few answers of the witness relative to the amount of the wire shipped on the ground there is no showing he has any personal knowledge of the wire shipped or the condition of it at the time it was shipped.

Mr. John Morrow: The shipping documents would be the best evidence.

The Court: You mean the bills of lading? [392]

Mr. Bunn: We would be happy to introduce them if counsel will not object. We will be happy to introduce the bills of lading on the shipments to South America.

The Court: Maybe that would be the best way to get at it, to break it down here. I don't see how you are going to be able to frame any shotgun question in connection with this.

The Witness: May I correct this, your Honor?

The Court: Your motion to strike is denied. He wants to correct something.

The Witness: We call good wire rusty wire.

The Court: How is that?

The Witness: When I say "good wire," I don't say that it was not rusty.

(Through interpreter): It was slightly rusted, but it is good as usable. The appearance of the wire that was shipped was all rusty.

The Court: All the wire that was shipped was rusty?

The Witness (Through interpreter): And it

(Testimony of J. B. Londono.)

was noted by the steamship companies in making the documents.

The Court: And your testimony is that about 20 per cent of it was good when you saw it here?

The Witness: Yes.

Mr. Diether: 25 per cent, he said.

The Court: 25 per cent. [393]

Mr. Diether: That 25 per cent was good and 75 per cent was not good.

The Court: The 25 per cent was good rusty wire?

The Witness: Good wire, very good for sale, good usable, but——(through interpreter) was dirty.

The Court: And 75 per cent was rusty, but not badly rusty?

The Witness: Yes, 75 per cent badly rusty.

The Court: Badly rusted?

The Witness: 75 per cent badly rusty.

The Court: Did you ship any pickled wire?

The Witness: No.

Mr. Diether: What kind of wire, your Honor?

The Court: Pickled wire.

The Witness: No.

The Court: Now, maybe we can go faster by moving a little slower right now, and by having a short recess.

(A short recess was taken.)